

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

74-1671

DOCKET NO. : 74-1671

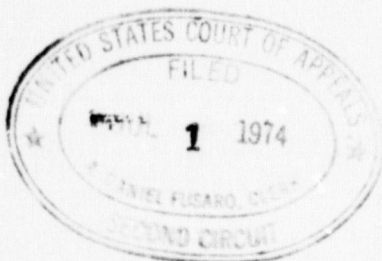
FRANK TUBBS, PRO SE
APPELLANT

V.

UNITED STATES OF AMERICA
APPELLEE

APPENDIX OF APPELLANT

FRANK TUBBS, PRO SE



FRANK TUBBS, PRO SE
37081-133-G
P. O. Box # 33
Terre Haute, Indiana
47808

Counsel For Appellant
Frank Tubbs

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PAGINATION AS IN ORIGINAL COPY

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- NOTE 1 : The Document numbers and the page numbers will correspond.
- *NOTE 2 : Document number (17.) is the beginning of page number 811 of the partial transcript-(12,716)-on record in this cause.
- NOTE 3 : Appellant Tubbs will make references in Brief-(74-1671)-directly to parts of the partial transcript on record (12,716)-, and in Appellant Tubbs' Appendix-(74-1671) in accordance with the pages as they correspond in the Original Transcript-(pages 844-thru-898). In a nutshell, the pages numbered in the Appendix at the beginning of Document number (17.) are the same as the pages in the trial transcript on record.

UNITED STATES DISTRICT COURT

C. Form No. 106 Rev.

[illegible]

DATE	PROCEEDINGS	Date Order Judgment
1974		
4/17	Ruling on Application for a Writ of Habeas Corpus, entered. Since petitioner is presently incarcerated in the United States Penitentiary at Terre Haute, Indiana, this Court lacks jurisdiction to grant him the post-conviction relief he seeks. Accordingly, the papers may be filed without fee; the petition is dismissed. Zampano, J. C.	
"	Petition for Writ of Habeas Corpus, filed. Copy to U.S. Atty. /m	
4/18	Judgment entered dismissing petition for writ of habeas corpus for lack of jurisdiction. Markowski, C. M-4/18/74 Copies mailed. /M	
7/29	Notice of Appeal, filed by Petitioner. Copy mailed to U.S.C.A. with copy of Docket Entries. Copy to U.S. Atty. and to Petitioner.	
6	Request for Transcript of proceedings in U.S.A. v. Frank Tubbs, Crim. 12,716, filed by Petitioner.	
7	Order endorsed on above Request for Transcript, as follows: "Motion for transcript denied. The Court has previously granted trial transcript in Criminal Case No. 12,716 for appeal purposes in forma pauperis. The Clerk of this Court is hereby instructed to remove pages 844 through 898 of the trial transcript in Criminal Case No. 12,716 for inclusion with the Record on Appeal in Civil Case No. N-74-88." Zampano, J. M-5/7/74 Copies to Petitioner, U.S. Attorney. Copy to criminal file.	

(A-1)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
NEW HAVEN, CONNECTICUT

FILED
APR 19 1974
U.S. DISTRICT COURT
NEW HAVEN, CONN.

FRANK TUBBS, PRO SE
APPELLANT

VS.

UNITED STATES OF AMERICA
APPELLEE

CIVIL NO. 12-74-88

NOTICE OF APPEAL

Notice is hereby given that Frank Tubbs, Petitioner, Pro Se, above named, hereby appeals to the United States Court of Appeals for the Second Circuit the judgement and Ruling on application for a Writ of Habeas Corpus pursuant to 28 U. S. C. A. 2241 (c) (1) (3) entered in the above captioned cause on the 17th and 18th day of April, 1974, in the United States District Court for the District of Connecticut, by the Honorable R. C. Zarpono, District Judge.

Frank Tubbs, Affiant
37081-133
P. O. Box 33
Terre Haute, Indiana
47808

CERTIFICATE OF SERVICE

I, Frank Tubbs, do hereby swear that on the 11
day of April, 1974, that I placed in the U. S.
Mail, registered, U. S. Air Postage, Special Delivery, one
copy of the foregoing notice of Appeal for delivery to:

Office of United States Attorney
Mr. Stewart H. Jones
Federal Bldg. Dist of Connecticut
New Haven, Connecticut
06505

Frank Tubbs
Frank Tubbs, Affiant

SUBSCRIBED and SWORN to before me
this 11 day of April 1974.

UNITED STATES PAROLE OFFICER

United States District Court

FOR THE

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

v.

FRANK TUBBS

No. 12,716 Criminal

To any United States Marshal or any other authorized officer:

You are hereby commanded to arrest FRANK TUBBS and bring him in
forthwith before the United States District Court for the District of Connecticut
in the city of New Haven to answer to an Indictment charging him with
violation of Title 18, Section 2113(a), Section 2(a), Section 2(b), Section 2113(d)
and Section 2113(e) of the United States Code, said charges enumerated in the
certified copy of the Indictment attached hereto.

~~in violation of~~

Dated at New Haven, Connecticut

on February 4, 19 70

Bail fixed at \$..... 25,000.00 WITH SURETY

50

RETURN

District of

Received the within warrant the

day of

GILBERT C. EARL

Clerk.

By

A true copy

Attest:

Deputy Clerk.

GILBERT C. EARL

SS Clerk, U. S. District Court

By:

(initials) Deputy and executed same.

By

'Insert designation of officer to whom the warrant is issued, e. g., "any United States Marshal or any other authorized officer"; or "United States Marshal for District of"; or "any United States Marshal"; or "any Special Agent of the Federal Bureau of Investigation"; or "any United States Marshal or any Special Agent of the Federal Bureau of Investigation"; or "any agent of the Alcohol Tax Unit."

(2.)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FILED
JAN 12 1970
U.S. DISTRICT COURT
NEW HAVEN, CONN.

UNITED STATES OF AMERICA

v.

FRANK TUBBS; WILLIAM AVERY,
also known as Cincinnati;
and PAMELA DARE, also known
as Sarah

CRIMINAL NO.

12,716

I N D I C T M E N T

THE GRAND JURY CHARGES:

COUNT ONE

On or about February 3, 1970 at New Haven in the District of Connecticut, FRANK TUBBS; WILLIAM AVERY, also known as Cincinnati; and PAMELA DARE, also known as Sarah, the defendants herein, did by force and violence and intimidation take from the person and presence of another money belonging to and in the care, custody, control, management and possession of the New Haven Savings Bank, Fair Haven Office, New Haven, Connecticut, the deposits of which were then insured by the Federal Deposit Insurance Corporation, Certificate No. 18261 dated June 20, 1960, in violation of Title 18, United States Code, Section 2113(a) and Title 18, United States Code, Section 2(a) and 2(b).

COUNT TWO

On or about February 3, 1970 at New Haven in the District of Connecticut, FRAIK TUBBS; WILLIAM AVERY, also known as Cincinnati; and PAMELA DARE, also known as Sarah, the defendants herein, did by force and violence and by intimidation take from the person and presence of another, money belonging to and in the care, custody, control, management and possession of the New Haven Savings Bank, Fair Haven Office, New Haven, Connecticut, the deposits of which were then insured by the Federal Deposit Insurance Corporation, Certificate No. 16261 dated June 20, 1960, and in committing the aforesaid acts, did put in jeopardy the lives of tellers and customers then in the aforesaid bank, including but not limited to Lorraine Casella, John R. McGuire, Jr., Adelaine Rush and Carol Carrano,

(3.)

by the use of a dangerous weapon, that is a gun, in violation of Title 18, United States Code, Section 2113(d) and Title 18, United States Code, Section 2(a) and 2(b).

COUNT THREE

On or about February 3, 1970 at New Haven in the District of Connecticut and elsewhere, FRANK TUBBS and WILLIAM AVERY, also known as Cincinnati, defendants herein, wilfully and unlawfully did possess a sum in excess of \$100.00 which had been taken and carried away with intent to steal and purloin from the New Haven Savings Bank, Fair Haven Office, New Haven, Connecticut, the deposits of which were insured by the Federal Deposit Insurance Corporation, Certificate No. 18261 dated June 20, 1960, and they then knew said money to have been so taken in violation of Title 18, United States Code, Section 2113(c).

A TRUE BILL

STEWART H. JONES
UNITED STATES ATTORNEY

FOREMAN

J. DANIEL SAGARIN
J. DANIEL SAGARIN
ASSISTANT UNITED STATES ATTORNEY

I hereby certify that the foregoing
is a true copy of the original document
on file.

CLEMENT C. EARL

Frances Longlio
Chief Deputy Clerk

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

212-264-6471

DOCKET NO. 35426

UNITED STATES OF AMERICA

Plaintiff-Appellee

VS.

FRANK TUBBS

Defendant-Appellant

Per elect 1-3-72

4-20-71

Argument

aff'd in open ct.

mandate 5-11-71

BRIEF OF THE DEFENDANT -
APPELLANT FRANK TUBBS

JOHN A. ACAMPORA, ESQ.
109 CHURCH STREET
NEW HAVEN, CONN. 06510

Counsel for Defendant-Appellant
Frank Tubbs

(4.)

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 35426

UNITED STATES OF AMERICA

Plaintiff-Appellee

VS.

FRANK TUBBS

Defendant-Appellant

BRIEF OF DEFENDANT-APPELLANT
FRANK TUBBS

(4-E)

STATEMENT OF THE CASE

✓ The grand jury at New Haven on April 2, 1970 returned a true Bill of Indictment against the defendant in three counts, the first count charging violations of Title 18 United States Code, Section 2113 (A), 2(a) and 2 (b), alleging the taking by force and violence and intimidation from the person and presence of another, money belonging to and in the care, custody, control, management and possession of a bank insured by the Federal Deposit Insurance Corporation;

✓ The Second Count charging violations of Title 18 United States Code, Section 2113 (d), 2 (a) and 2 (b) alleging that in the commission of acts alleged in count one, said aforesaid acts did put in jeopardy the lives of tellers and customers of said bank by use of a dangerous weapon;

✓ And the Third Count charging violations of Title 18 United States Code, Section 2113 (c) alleging the possession of a sum in excess of \$100. which had been taken and carried away with intent to steal and purloin from a bank, the deposits of which were insured by the Federal Deposit Insurance Corporation.

In the aforesaid three count indictment, the defendants Frank Tubbs, Pamela Dare and William Avery were charged with having robbed the Fair Haven Branch of the New Haven Savings Bank on February 3, 1970.

On February 25, 1970, all defendants pleaded not guilty to each count of

(4-F)

✓ the indictment and were allowed three weeks to file motions.

On March 23, 1970, Motion for Reduction of Bail, Motion to Order the Grand Jury Minutes Transcribed, Motion for Discovery and Inspection, Motion for a Separate Trial, Motion to Dismiss and/or Quash the Indictment, Motion to Suppress and Motion for a Bill of Particulars were filed by Counsel for the defendant Frank Tubbs.

On May 14, 1970, the Government filed Motions for Severance of the defendants William Avery and Pamela Dare. Said motions were granted on May 19, 1970 by Chief Judge Timbers. The United States Attorney's Office was then directed to retype the aforementioned indictment, eliminating all reference to the defendants William Avery and Pamela Dare.

In addition, on said date new information was filed re the defendant Pamela Dare with the order that the present indictment be dismissed against her. Subsequently, the defendant William Avery withdrew his plea of not guilty as to count three of the aforementioned indictment and a plea of guilty to said count was entered. The remaining two counts of the indictment against the defendant Avery were dismissed at the time of sentencing.

The case was reached for trial at New Haven on May 19, 1970, before Chief Judge Timbers. On that date defense counsel challenged the jury array and filed motions challenging the entire array. A motion was also addressed to the court with reference to a continuance, in that two defendants had been severed from the case, and the defendant was attempting to

✓ retain private counsel. Chief Judge Timbers denied all motions and proceeded to examine the jurors on voir-dire.

On May 20, 1970, twelve jurors and two alternates were impanelled, sworn and excused until June 9, 1970. On this date the defendant entered into a stipulation consenting to the presiding of Judge Zampano at the trial of this case although Judge Timbers presided at the selection of the jury.

The Government proceeded with its case, putting on numerous witnesses and exhibits. The prosecution's case was based on the testimony of the two co-defendants Avery and Dare. The defense consisted of four witnesses who placed the defendant at other parts of the city during the time of the bank robbery and for a period of time thereafter. Motions for Judgment of Acquittal were made and filed by the defendant at the close of the prosecution's case and again at the end of all the evidence. They were denied each time by the court. After summations of counsel on the morning of June 16, 1970, Judge Zampano charged the jury on the three counts of the indictment. Exceptions to the charge were taken and the jury was re-charged on the first and second counts of the indictment. Count three of the indictment was withdrawn from the jury based on the ruling in U.S. v. Roche 321 Fed. 2d 1.

After jury deliberations, during which time it requested further instruction and clarification, verdicts of guilty on both counts of the indictment were returned.

On September 17, 1970, the defendant Frank Tubbs was presented before

✓ Judge Zampano for sentencing, at which time the defendant's motion for production and disclosure of the presentence investigation was denied. A sentence of nineteen years imprisonment on count one of the indictment was imposed and imposition of sentence on count two was suspended by the court. A timely notice of appeal was subsequently filed by the defendant.

ISSUES PRESENTED

- I. Did the method of selecting the trial jury deny the defendant a fair trial and deprive him of his constitutional rights?
- II. Was the defendant deprived a fair trial because of the absence of an individual voir-dire?

THE FACTS

A few minutes after 9:00 A.M. on February 3, 1970, two men, wearing stocking masks, entered the side entrance of the Fair Haven branch of the New Haven Savings Bank. One of the bandits remained at the side entrance with what appeared to be a revolver in his hand. The two men were of about the same height and weight and were wearing long raincoats with large brimmed hats. The person at the door held the customers and employees of the bank at gun point. The second bandit entered the teller section of the bank emptying the drawers at the tellers stations into a sack-like container resembling a pillow case. After approximately three minutes in the bank, the two men fled out the side entrance of the bank and ran across a rear yard. The bandits then entered a late model automobile parked on a side street where a third person was seen at the drivers position. The car then sped from the scene in a northerly direction.

Approximately five hours later at almost 5:30 P.M., the defendant Frank Tubbs was placed under arrest in Room 202 of the Holiday Inn (249a). The Holiday Inn is a motor hotel near downtown New Haven. Several New Haven police were on the scene and upon the arrest of the defendant, a search of Room 202 was conducted. The search revealed approximately \$3,000. in cash containing bills which were later identified as being part of the so-called "bait money" from the bank. Also found in the search was a nine

(4-K)

shot 22. calibre revolver (534 r., 538 r.). The aforementioned articles were found in an attache case located in the hotel room.

A witness had obtained the registration number of the vehicle leaving the scene of the robbery (486 r.) and the New Haven Police Department put out a bulletin to locate the vehicle in question. Later that day a late model car bearing the reported Connecticut registration was located in New Haven. The car was registered to a Thomas Johnson and was being operated by a female who identified herself as Sarah Cushenberry, also known as Pamela Dare. Upon questioning, Miss Dare first disclaimed any knowledge of the bank robbery. She later gave a statement which implicated William Avery and Frank Tubbs. William Avery was subsequently apprehended at La Guardia Airport in New York.

ARGUMENT

THE APPELLANT WAS DENIED A FAIR TRIAL AND HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY BY THE METHOD OF SELECTION OF THE TRIAL JURY.

It was our contention in the court below that fundamental questions of trial fairness were presented by our motions and requests addressed to the selection of the trial jury (63 r.)

Pursuant to Title 28 Section 1867 U. S. C. the court below failed to comply with the provisions of Title 28 in the selection of the trial jury which returned the verdict against the defendant. It is the appellant's position that Sections 1861 and 1963 give the right to all citizens of the United States to have the opportunity to be considered for service on Grand and Petit Juries upon meeting the qualifications of Section 1865. It is also the appellant's position that the plan adopted by the District Court for the District of Connecticut is illegal because it interferes with the right of a citizen to have the opportunity to be considered for service as a juror because it does not achieve the objective of Section 1861 and 1862 as required by Section 1863 in that it imposes higher standards and additional requirements above and beyond the requirements of Section 1865. These higher standards are imposed by limiting the selection of prospective jurors to only those persons listed as registered voters under the laws of the State of Connecticut.

Section 1861, in setting forth policy, reads that:

It is the policy of the United States that all litigants in Federal

Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the Court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

In setting forth the plan for random jury selection, the first sentence of Section 1863, reads:

- (a) Each United States District Court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of Sections 1861 and 1862 of this Title, and that shall otherwise comply with the provisions of this Title.

Section 1863 sets forth certain requirements of all plans adopted. One of these requirements concerns the source of prospective jurors and is set forth in the first sentence of sub-section (b) (2) of Section 1863 which requires that the plan shall:

- (2) specify whether the names of prospective jurors shall be selected from the voter registration lists or the list of actual voters of the political sub-divisions within the district or division. The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by Sections 1861 and 1862 of this title. (Underscoring ours)

The first paragraph of Article VI of the Plan for random selection of jurors adopted by the District Court for the District of Connecticut provides as follows:

Random Selection From Voter Registration Lists

The Court finds that the voter registration lists represent a fair cross-section of the populace in the District of Connecticut,

and that it is not necessary to prescribe any other source or sources of names of prospective jurors in addition to such lists in order to foster the policy and protect the rights secured by sections 1861 and 1862 of Title 28 U.S.C. Therefore, all names of grand and petit jurors serving on or after the effective date of this Plan shall be selected at random from the latest printed list of registered voters, published by the registrars of the one hundred sixty-nine (169) political subdivisions within the Judicial District, which are available at the time the jury selection process commences.

In accordance with Title 28 Section 1865, Qualifications for jury service the Plan for random selection of jurors provides in Article VII as follows:

Qualification for Jury Service

Any person shall be qualified to serve on grand and petit juries pursuant to Section 1865 of Title 28 U.S.C. unless he

- (1) Is not a citizen of the United States twenty-one years old who has resided for a period of one year within the Judicial District;
- (2) Is unable to read, write and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification forms;
- (3) Is unable to speak the English language;
- (4) Is incapable, by reason of mental or physical infirmity, to render satisfactory jury service;
- (5) Has a charge pending against him for the commission of, or has been convicted in a State or Federal Court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

As set forth above in Article VI of the Plan for selection of jurors, all names of grand and petit jurors shall be selected from the list of registered voters as published by the registrars of the political subdivisions of Connecticut. Chapter 143 QUALIFICATIONS AND ADMISSION OF ELECTORS,

of the Connecticut General Statutes, Revision of 1958 as amended, is the Chapter which controls the persons that may be listed as registered voters. The Sections of concern here are Sections 9-12, Who May be Admitted, and 9-20, Admission of Electors.

Section 9-12, provides as follows:

Each citizen of the United States who has attained the age of twenty-one years, who has resided in the town in which he applies for admission to the privileges of an elector at least six months next preceding the time he so applies, and who, at the time of so applying, is able to read in the English language any article of the constitution or any section of the statutes of the state, and sustains a good moral character, shall, on taking the oath prescribed by law, be an elector. No idiot or mentally ill person shall be admitted as an elector.

Section 9-12 has higher and additional requirements for qualification as a voter than Section 1865 of the Federal Statutes in setting forth qualifications to be considered for jury service. Both statutes require that a prospective juror be a citizen of the United States and twenty-one years of age. The Federal Statute requires residence for a period of one year within the judicial district. In contrast, the Connecticut Statute requires six months residence in a town. Therefore, in order to be considered for jury service one would have to remain in a town for at least six months even though under the Federal Statute one could move about within the judicial district as long as one has remained within the judicial district for a year. Therefore, Section 9-12 imposes an additional requirement as to residence. The Connecticut Statute requires that the prospective juror be able to read in the

English language any article of the constitution or any section of the statutes of the State while the Federal requirement is only that a person be able to read, write and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification forms. Again the Connecticut requirement imposes a higher or greater standard with regard to proficiency in the English language.

Further, the Connecticut statute requires that a person be one who "sustains a good moral character." There is no such requirement under the Federal Statutes. Section 9-12 requires one to take an oath prescribed by law before he may be an elector and listed as a registered voter. The oath is set forth in Section 1-25 of the Connecticut General Statutes. There is no such requirement under Federal law. These are an additional requirements imposed under the Connecticut Plan by requiring that all jurors be registered voters of the State of Connecticut.

Section 9-20 requires that before a person is admitted as a voter he must be able to read any articles of the constitution or any section of the statutes designated by a Connecticut admission official in a way to show that he has not memorized it.

The requirement of the plan that all prospective jurors be taken from the list of registered voters imposes higher and additional qualifications to be met by prospective jurors that that required by the Federal Statutes in regard to (1) residence (2) proficiency in the English language (3) moral character and (4) taking of an oath.

Section 1-25 sets forth the elector's oath. The oath in effect at the time the persons on the list from which jurors were chosen for the case must have taken provides in part:

You solemnly swear that you will be true and faithful to the State of Connecticut, and the constitution and government thereof

It is clear that the standards for qualification to be considered for jury service as set forth in Section 1865 are not merely minimum standards. *Rabinowitz v. United States* CA5, 1966, 366 F. 2d 34. In the *Rabinowitz* case the court extensively reviewed the legislative history of jury qualifications in the Federal courts from the time prior to 1948 when qualifications were the same as those for the state where the district court sat to the enactment in 1957 of the immediate predecessor to the present Section 1865 setting exclusive federal standards (p. 44 to 54).

The Court said at page 59:

What the law clearly does require is that the standards and designs prescribed by Congress be followed. We conclude that there were impermissible departures from the statutory scheme both as to the qualification required of prospective jurors and as to the method and procedure by which the list was compiled ...

In the *Rabinowitz* case persons charged with compiling the jury list for a federal district court were found to have violated the statutory scheme by having treated the statutory standards as minimum standards to which they added their own ideas as to character, intelligence and ability to comprehend proceedings in the Federal Court.

In 1968 the federal statutes were amended. (S. 989) and Section 1865 was

enacted as it now appears. In speaking in support of the 1968 Amendment Representative Roth stated as follows as reported in Vol. 114 Cong. Rec. 1798:

The qualifications prescribed by Section. 989 are basically the same as the present statutory qualifications. Sec. 989 makes clear that use of additional tests is impermissible.

It is equally clear that the purpose of Federal Statutes is to establish objective tests for juror qualifications. In Rabinowitz Supra P. 54 the court said:

The federal qualifications are objective, and precise, requiring in their application no discretion on the part of the court clerk and jury commission.

The present Section 1865 (b) specifically provides that the Court "shall deem any person qualified to serve on grand or petit juries in the district court unless he" is disqualified by criteria set forth therein. Congress clearly intended that Section 1865 control qualifications for consideration for jury service and to eliminate subjective tests. U.S. Cong. and Adm. News 1968 Vol. 2 page 1803.

The Connecticut requirement of good moral character in addition to being an additional requirement is also objectionable because it leaves its determination to local officials on a subjective basis. There are no standards to guide local officials. Section 9-12 C.G.S.

The requirement of Section 9-20 concerning ability to read any section of the statutes or constitution in such a manner to show he is not reciting from

memory is also an additional requirement determined on a subjective basis by a local official. There are no standards to guide the local official. Sec. 9-20 C.G.S.

The oath required by Section 9-12 as set forth in Section 1-25 is invalid as vague and uncertain and as prohibiting more than may be constitutionally prohibited. *Baggett v. Bullitt*, 377 U.S. 360, 84 Sup. Ct. 1316, 12 L. Ed. 2d 321 (1966). Thus to be eligible for jury service one must take an invalid oath.

There is clearly a right to have the opportunity to be considered for jury service upon meeting the federal qualifications. *Rabinowitz v. U.S.* supra at 54 Sections 1861, 1863 and 1865 Title 28 U.S.C. *Abbot v. Mines*, 411 F. 2d 353 (1969). The record of the consideration by Congress of Section 989 in 1968 is replete with reference to this right. Vol. 114 Cong. Rec. 3989 - 4008.

The Supreme Court has recently recognized this right in *Carter v. Greene County* 24 L. Ed. 2d 549, 90 Sup. Ct. (January 19, 1970). That case involved a declaratory judgment by Negro citizens of Alabama claiming they were qualified to serve as jurors but had never been summoned for jury service. The Court said at 24 L. Ed. 2d 557:

Defendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection. People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion...

Article VI of the Plan recites a finding that the voter registration lists

represent a fair cross-section of the populace in the district. However, the Article does not recite a finding that such voter registration lists insure that all citizens will have the opportunity to be considered for service on juries. It does not appear from the plan that the Court in adopting the plan considered the right of all citizens to have an opportunity to be considered for service upon meeting the qualifications of the Federal Statutes. Section 1863 (b) (2) specifically provides that other sources of names shall be used where necessary.

It is not the appellant's position that voter registration lists may never be used or that in some jurisdictions voter registration lists may not be an appropriate sole source of prospective jurors. It is the appellant's claim that such a procedure is not appropriate in the Judicial Districts for the Districts of Connecticut. In that the particular requirements for becoming a registered voter in the State of Connecticut are such that it denies equal opportunity for all citizens who meet the Federal qualifications for jury service to be considered for service. It is not urged that every individual meeting those requirements must be given an opportunity to serve but only that each must have an equal opportunity to be considered for service.

There has been a substantial failure to comply with Title 28 U.S.C. The plan adopted by the District Court by limiting prospective jurors to registered voters in effect imposes higher qualifications than required under federal statutes. The plan defeats rather than fosters the rights secured by Title 28.

While the courts have rejected challenges to the jury selection method in several cases, those cases can be distinguished from the instant case.

In *Grimes v. United States*, 391 F. 2d 709, cert. denied 393 U.S. 825, the defendant was convicted in the United States District Court for the Middle District of Georgia of possessing non-tax paid whiskey. The defendant attempted to raise two issues concerning the jury. First, that the use of voter registration lists as the sole source of names for jury duty resulted in an illegally constituted jury because non-voters had been excluded and secondly that improper care had been exercised by the Jury Commissioner and Clerk in compiling the jury lists with regard to the qualifications for jurors. The Court held that the use of voter registration lists was proper where there was no showing that the use of the lists resulted in exclusion of a cognizable group or class of qualified citizens and that non-voters are not a cognizable group. The Court did not consider the issue of impropriety on the part of the Jury Commissioner and Clerk for want of proof in the record. There was no issue raised concerning the right of a person to be considered for jury service. The case was decided on March 20, 1968. However, the indictment and trial were prior to the 1968 Amendments to the Federal Statutes.

United States v. Bennett, 409 Fed. 2d 888, was decided in February, 1969, but according to the opinion (Page 900) the indictment was returned in 1967. The jury selection procedure was that in effect prior to the amendment to the statutes in 1968. No issue was raised concerning the right of an individual to be

considered for jury service upon meeting the Federal qualifications.

United States v. Caci, 401 F. 2d 664, cert. denied 394 U.S. 917, arose before the 1968 amendment. The Court discussed the action on the part of the Jury Commissioner in excluding certain persons on the basis of their answers to the questionnaire when it was indicated that they were of low mentality. The Court said at page 671:

It is arguable that Section 1861 (3) specifically authorizes the Commissioner to reject such persons as "incapable, by reason of mental ... infirmities to render efficient jury service. " In any event, it is settled in this Circuit that a Jury Commissioner has discretion under 28 U.S.C. Section 1864 (1964) to reject prospective jurors as not "qualified" for reasons other than those listed in Section 1861. See United States v. Flynn, 216 F. 2d 354, 386-388 (2d Cir. 1954), cert. denied 348 U.S. 909, 75 S. Ct. 295, 99 L. Ed. 713 (1955).

It is submitted that the decision of the Court on this point was incorrect. The cases cited by the Court were decided in 1954 and 1955. They preceded the 1957 Civil Rights Act. It is submitted that these cases were overruled by that legislation as extensively discussed in Rabinowitz v. United States 366 F. 2d 34.

The Caci case was overruled on this point by the 1968 amendment. Sec-

(4-W)

tion 1861 (3) referred to by the Court was superceded by the present Section 1865. In addition, the present Section 1866 was enacted.

The present Section 1865 in part provides that a Judge of the District Court shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is qualified for, exempt, or to be excused from jury service. That section further provides that in making such determination the Judge shall deem any person qualified to serve on Grand and Petit Juries in the District Court unless he fails to meet the specific criteria set forth in the statute.

The present Section 1866 (c) provides in part as follows:

- (c) Except as provided in Section 1865 of this Title or in any jury selection plan provision adopted pursuant to paragraph (5), (6) or (7) of Section 1863 (b) of this Title, no person or class of persons shall be disqualified, excluded, excused or exempt from service as jurors: Provided ...

Section 1866 (c) goes on to provide for the excuse and exclusion of jurors based on Federal statutory criteria. This Section does not provide any basis for disqualification of a prospective juror.

It is submitted that the enactment of the 1968 amendment overruled any cases in the Circuit which permitted rejection of prospective jurors for a reason other than those specified in the Federal statutes and further, the determination of disqualification can only be made by a federal judge on the basis of the information in the qualification form or other competent evidence presented in court. Title 28 U.S.C. Sections 1864-1866.

(4-X)

It is our contention at this time that the District Court for the District of Connecticut in its failure to comply with Title 28 U.S.C. has deprived the appellant of his constitutional right to due process of law under the Fifth Amendment and his right to an impartial jury under the Sixth Amendment.

II.

THE APPELLANT WAS DENIED A FAIR TRIAL IN THAT THE TRIAL JURY WAS SELECTED WITHOUT REASONABLY SUFFICIENT, IN DEPTH, OR PROPERLY INDIVIDUALIZED INTERROGATION AS TO THEIR PREJUDICES AND THEIR IMPARTIALITY.

Preliminarily, it should be noted that defense motions addressed to the entire jury array focused on the result of the selection process in that there was no minority representation on the entire jury panel (59 r.). The absence of any black jurors on the panel, in the trial of a black defendant would indicate that greater individualized interrogation of each prospective juror would be desirable trial practice.

The denial of motions addressed to the jury array deprived the defendant of a vital process needed to impanel a fair trial jury.

Basye v. State of Nebraska, 45 Neb. 261, 63 N.W. 814, the opinion of the court related:

"One object of the voir dire examination is to ascertain whether the mind of the venireman is entirely free from bias or prejudice and whether he would make a competent juror. But the purpose of such examination is not alone to ascertain whether sufficient grounds for challenge for cause exist, but as well to enable the accused to properly exercise his right to challenge peremptorily."

Under Title 18 U.S.C.A. Fed. Rules Crim. Proc. Rule 24 (b) the defendant is allowed varying amounts of peremptory challenges. It would appear that the effective exercise of these challenges, in the instant case, could only be realized by in depth, individualized interrogation of the prospective jurors.

In *Oden v. State of Nebraska* 166 Neb. 729, 90 N.W. 2d 356, it was the court's opinion that the preclusion of counsel from conducting the voir dire examination was fatal to the defense and thus prejudicial error.

The Sixth Amendment to the constitution guarantees to each defendant charged with crime that he shall "enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. ."

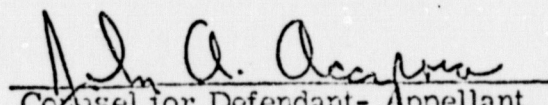
In conclusion, it is the appellant's claim that in the instant case, an individual voir dire, conducted by counsel in consultation with the accused, was essential to the defendant's receiving a fair trial.

CONCLUSION

The appellant respectfully asks this court to reverse his conviction, or in the alternative to remand for a new trial.

Respectfully submitted,

JOHN A. ACAMPORA, ESQ.


Counsel for Defendant-Appellant
Frank Tubbs

United States Court of Appeals

FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of April one thousand nine hundred and seventy-one.

Present:

HON. HENRY J. FRIENDLY,

HON. ROBERT P. ANDERSON,
Circuit Judges,

HON. RICHARD H. LEVET,
District Judge.

United States of America,
Plaintiff-Appellee,

v.

Frank Tubbs, William Avery a/k/a
Cincinnati; and Pamela Dare, etc.,
Defendants

Frank Tubbs,
Defendant-Appellant.

Appeal from the United States District Court for the
District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

FILED

AUG 24 1 26 PM '71

MOTION, PURSUANT TO SECTION 2255 OF TITLE 28 U.S. DISTRICT COURT
UNITED STATES CODE NEW HAVEN, CONN.
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
ATTACKING A SENTENCE IMPOSED BY THAT COURT

FRANK TUBES
PETITIONER

VS

UNITED STATES OF AMERICA
RESPONDENT

14587

-CRIMINAL NO.-12,716-

And 20, 1971. O M.T. B. 1-

- (1) PLACE OF DETENTION TERRE HAUTE, INDIANA
- (2) NAME AND LOCATION OF COURT WHICH, AND NAME OF JUDGE, WHO: IMPOSED SENTENCE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, BY THE
HONORABLE R. C. ZAMPANO.
- (3) THE INDICTMENT NUMBER OR NUMBERS (IF KNOWN) UPON WHICH AND THE OFFENSE
OR OFFENSES FOR WHICH SENTENCE WAS IMPOSED:
(A) VIOLATION OF TITLE 18, SEC. 2113 (A) SEC. 2 (A)
(B) SEC 2(3) SEC 2113 (D) AND SEC. 2113 (C) OF THE U. S. CODE
(C) SAID CHARGES ENUMERATED IN THE CERTIFIED COPY OF THE INDICTMENT.
- (4) THE DATE UPON WHICH SENTENCE WAS IMPOSED AND THE TERM OF SENTENCE:
(A) SEPT. 17, 1970
(B) A TERM OF (19) YEARS WAS IMPOSED TO BE SERVED.
- (5) CHECK WHEATHER A FINDING OF GUILTY WAS MADE
(A) AFTER A PLEA OF GUILTY X
(B) AFTER A PLEA OF NOT GUILTY YES
(C) AFTER A PLEA OF NOLO CONTENDERE X
- (6) IF YOU WERE FOUND GUILTY AFTER A PLEA OF NOT GUILTY, CHECK WHETHER THAT
WAS MADE BY:
(A) A JURY X
(B) A JUDGE WITHOUT A JURY _____
- (7) DID YOU APPEAL FROM THE JUDGEMENT OF CONVICTION OR THE IMPOSITION OF
SENTENCE? YES
- (8) IF YOU ANSWERED "YES" TO (7), LIST:
(A) THE NAME OF EACH COURT TO WHICH YOU APPEALED:
THE U. S. COURT OF APPEALS: SECOND CIRCUIT: U. S. COURTHOUSE, NEW YORK.

(6.)

(2)

11. XXXXXXXXXXXXXXXX
111. XXXXXXXXXXXXXXXX

(b) THE RESULT IN EACH SUCH COURT TO WHICH YOU APPEALED:

IN THE U. S. COURT OF APPEALS: FOR THE SECOND CIRCUIT THE RESULT OF THE ACTION WAS JUDGMENT AFFIRMED.

(c) THE DATE OF EACH SUCH RESULT:

APRIL 20, 1971

(d) IF KNOWN, CITATIONS OF ANY WRITTEN OPINIONS OR ORDERS ENTERED PURSUANT TO SUCH RESULTS:

1. _____

(9) STATE CONCISELY, THE GROUNDS ON WHICH YOU BASE YOUR ALLEGATION THAT THE SENTENCE IMPOSED ON YOU IS INVALID:

- (a) INEFFECTIVE COUNSEL EMPLOYING UNETHICAL PRACTICE.
- (b) ERRONEOUS INDICTMENT WAS USED DURING TRIAL.
- (c) IN ADMISSAL EVIDENCE WAS USED BY THE GOVERNMENT'S COUNSEL.
- (d) PREJUDICIAL TRIAL VENUEUS LOCI.
- (e) THE JURY WAS NOT MY PEERS.

- (10) (a) MY COURT APPOINTED ATTORNEY GAVE THE GOVERNMENT'S COUNSEL MY WHOLE DEFENSE STATEMENT WITHOUT MY CONSENT, BEFORE THE TRIAL. HE ALSO GAVE THE F. B. I. VIA GOVERNMENT COUNSEL A COMPLETE LIST OF ALL MY DEFENSE WITNESSES BEFORE TRIAL TO BE ADVERSELY INFLUENCED FOR MY CAUSE. HE FAILED TO INTRODUCE THE ONLY MATERIAL EVIDENCE FOR MY DEFENSE INTO TRIAL RECORDS. AND HE FAILED TO QUESTION ALL OF MY DEFENSE WITNESSES.
- (b) I WAS CHARGED IN MY INDICTMENT WITH VIOLATION OF TITLE 18, SEC. 2113 (a) sec 2 (a) sec 2 (b) sec. 2113 (d) AND sec. 2113 (c) OF THE U. S. CODE, SAID CHARGES WERE READ TO THE JURY IN THAT ORDER AT THE START OF MY TRIAL. THE TRIAL PROCEEDED WITH EVIDENCE BEING SUBMITTED SOLELY ON VIOLATION OF TITLE 18, U. S. CODE SEC. 2113 (c)
- AT THE END OF THE TRIAL AND AFTER THE JUDGE CHARGED THE JURY HE DISCOVERED TITLE 18, U. S. CODE, SEC 2113 (c) IS CONTRADICTORY ON THE SAME INDICTMENT WITH TITLE 18, SEC. 2113 (a) sec. 2(a) sec. 2(b) AND SEC 2113 (d). A MISTRIAL AT THAT POINT SHOULD HAVE BEEN DECLARED BY THE COURT, HOWEVER THE JUDGE RECALLED THE JURY FROM DELIBERATION, TOOK A PAIR OF SCISSORS, CUT OFF FROM THE CERTIFIED INDICTMENT TITLE 18 sec. 2113 (c), RECHARGED THE JURY WITH VIOLATING MY CONSTITUTIONAL RIGHTS IN THE PROCESS WITH NO OBJECTION WHAT SO EVER FROM THE COURT APPOINTED DEFENSE COUNSEL.
- (c) IN THE ABOVE PARAGRAPH (c) IS EXPLAINED
- (d) I WAS THE ONLY BLACK MAN IN THE COURTROOM AS GOVERNMENT WITNESSES IDENTIFIED THE ALLEGED BANK ROBBER AS A BLACK MAN -PERIOD -BEFORE THE JURY.
- (e) THE JURY WAS COMPOSED OF MEMBERS OF PEOPLE FOREIGN TO ME IN EVERY WAY, I BEING ALSO FOREIGN TO THEM IN EVERY WAY.

(6-A)

(3)

(3)

(11) HAVE YOU PREVIOUSLY FILED PETITIONS FOR HABEAS CORPUS, MOTIONS UNDER SEC. 2255 OF TITLE 28, U. S. CODE, OR ANY OTHER APPLICATIONS, PETITIONS OR MOTIONS WITH RESPECT TO THIS CONVICTION? NO

(12) IF YOU ANSWERED "YES" TO (11), LIST WITH RESPECT TO EACH PETITION, MOTION OR APPLICATION

(A) THE SPECIFIC NATURE THERE OF:

- i.
- ii.
- iii.

(B) THE NAME AND LOCATION OF COURT IN WHICH EACH WAS FILED:

- i.
- ii.
- iii.

(C) THE DISPOSITION THEREOF:

- i.
- ii.
- iii.

(D) THE DATE OF EACH SUCH DISPOSITION:

- i.
- ii.
- iii.

(E) IF KNOWN, CITATIONS OF ANY WRITTEN OPINIONS OR ORDERS ENTERED PURSUANT TO EACH SUCH DISPOSITION:

- i.
- ii.
- iii.

(13) HAS ANY GROUND SET FORTH IN (9) BEEN PREVIOUSLY PRESENTED TO THIS OR ANY OTHER FEDERAL COURT BY WAY OF PETITION FOR HABEAS CORPUS, MOTION UNDER SEC. 2255 OF TITLE 28, U. S. CODE, OR ANY OTHER PETITION, MOTION OR APPLICATION? NO

(14) IF YOU ANSWERED "YES" TO (13) IDENTIFY

(A) WHICH GROUNDS HAVE PREVIOUSLY PRESENTED:

- i.
- ii.
- iii.

(B) THE PRECEDENCES IN WHICH EACH GROUND WAS RAISED:

- i.

(15) WERE YOU REPRESENTED BY AN ATTY. AT ANY TIME DURING THE COURSE OF

(A) YOUR ARRAIGNMENT AND PLEA? YES

(B) YOUR TRIAL, IF ANY? YES

(C) YOUR SENTENCING? YES

(D) YOUR APPEAL, IF ANY, FROM THE JUDGMENT OF CONVICTION OR THE IMPOSITION OF SENTENCE? THE IMPOSITION OF SENTENCE

(E) PREPARATION, PRESENTATION OR CONSIDERATION OF ANY PETITIONS, MOTIONS OR APPLICATIONS WITH RESPECT TO THE CONVICTION, WHICH YOU FILED?
YES

(16) IF YOU ANSWERED "YES" TO ONE OR MORE PARTS OF (15) LIST

(A) THE NAME ADDRESS OF EACH ATTY. WHO REPRESENTED YOU:

MR. JOHN ACAMPORA
109 CHURCH ST.
NEW HAVEN, CONN.

(6-B)

11. SAME AS IN (1)
111. SAME AS IN (1)

17. IF YOU ARE SEEKING LEAVE TO PROCEED IN FORMER PAPERS HAVE YOU COMPLETED
THE SWORN AFFIDAVIT SETTING FORTH THE REQUIRED INFORMATION? YES

Frank Tubbs
FRANK TUBBS PETITIONER

THE STATE OF INDIANA)
) ss.
)
IN THE COUNTY OF)
 VIGO)

FRANK TUBBS, BEING FIRST SWORN UNDER OATH, PRESENTED THAT HE HAS SUBSCRIBED
TO THE FORE GOING PETITION AND DOES STATE THAT INFORMATION THEREIN IS TRUE TO THE
BEST OF HIS KNOWLEDGE AND BELIEF.

Frank Tubbs
FRANK TUBBS PETITIONER

SUBSCRIBED AND SWORN TO BEFORE ME THIS 2ND DAY OF August, 1971.

R.O. Hamel
CARE TENDER

PAROLE OFFICER - AUTHORIZED
BY ACT OF JULY 7, 1955 TO
ADMINISTER OATHS (18 USC 4004)

(6-C)

DISTRICT OF CONNECTICUT

FRANK TUBBS

v.

UNITED STATES OF AMERICA

CIVIL NO. 14587

JUDGMENT

This cause came on for consideration on a Motion to Vacate Judgment pursuant to 18 U.S.C. § 2255, and the Court having entered its Memorandum of Decision under date of February 9, 1972, denying the said motion,

It is accordingly ORDERED, ADJUDGED AND DECREED that judgment be and is hereby entered in favor of the respondent, dismissing the motion to vacate judgment.

Dated at New Haven, Connecticut, this 9th day of February, 1972.

Clerk, United States District Court

By

James P. Baugh
Deputy-in-Charge

(7.)

FEB 8 8 59 AM '72

U.S. DISTRICT COURT
NEW HAVEN, CONN.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

FRANK TUBBS

v.

UNITED STATES OF AMERICA

CIVIL NO. 14587

MEMORANDUM OF DECISION

The petitioner, Frank Tubbs, was convicted of bank robbery after a jury trial and sentenced by this Court to 19 years imprisonment on September 17, 1970. His conviction was affirmed per curiam by the Court of Appeals for the Second Circuit on April 20, 1971. He now moves, pursuant to 18 U.S.C. § 2255, to have his conviction set aside and his sentence vacated on the ground that his attorney failed adequately to represent him at trial.

No hearing is necessary. See United States v. Holiday, 319 F.2d 775, 776 (2 Cir. 1963). The allegations in the petition are purely conclusionary and frivolous. The evidence at trial was overwhelming. At all times the petitioner's attorney acted conscientiously and competently to protect his client's interests. The petitioner's contentions to the contrary are completely contradicted by the record.

Accordingly, petitioner's motion is denied.

Dated at New Haven, Connecticut, this 8th day of February, 1972.

Robert C. Zampano
United States District Judge

(7-A)

filed
Dec 1-10

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FRANK TUBBS,

Petitioner,

vs-

UNITED STATES OF AMERICA,

Respondent.

CRIMINAL NO. 12, 716

VERIFIED PETITION TO VACATE AND SET ASIDE CON-
VICTION, SENTENCE, AND JUDGMENT PURSUANT TO
TITLE 28 §2255 AND/OR TO MODIFY AND RE-
DUCE SAME

Comes now the petitioner, FRANK TUBBS, by counsel,
and respectfully petitions this Honorable Court as follows:

1. That he is presently confined at the United States Penitentiary at Terre Haute, Indiana, by virtue of a judgment of conviction against him rendered by the United States District Court for the District of Connecticut.

2. That he was tried in the United States District Court for the District of Connecticut, by The Honorable R. C. Zampano,

3. That the offenses and indictment numbers for which sentence was imposed as follows: Count One charged the petitioner with violation of Title 18 United States Code, Section 22113 (A), 2(a) and 2(b), alleging the taking by force and violence and intimidation from the person and presence of another, money belonging to and in the care, custody, control, management and possession of a bank insured by the Federal Deposit Insurance Corporation. Count Two charged violations of Title 18 United States Code, Section 2113(d), 2(a) and 2(b) alleging that in the commission of acts alleged in count one, said aforesaid acts did put in jeopardy the lives of tellers and customers of said bank by use of a dangerous weapon.

(8.)

4. That said sentence was rendered on September 17, 1970, and that your petitioner was sentenced to a term of nineteen (19) years imprisonment.

5. That your petitioner was found guilty following a trial by jury during which he entered a plea of not guilty.

6. That said judgment was appealed to the United States Court of Appeals for the Second Circuit, and that as a result thereof, said judgment and sentence was affirmed on April 20, 1971.

7. That your petitioner believes that the sentence imposed upon him to be invalid for the following reasons:

(a) That he was charged under an erroneous indictment, and that it was improper and contrary to law that the third count, charging violations of Title 18, United States Code Section 2113 (c) alleging the possession of a sum in excess of One Hundred (\$100.00) Dollars which had been taken and carried away with intent to steal and purloin from a bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, was withdrawn from the jury following readings of the entire indictment, including Count Three, to them, and the presentation of damaging evidence in

(b) That he was denied the Constitutional rights guaranteed under the Fourteenth and Fifth Amendments by being subjected to an identification procedure during trial that was so unorthodox and suggestive that it subjected petitioner to what amounted to a "show-up."

(c) That his Constitutional Rights guaranteed him under the Fourth Amendment were violated when the motel room in which he was staying was improperly searched and seized, and that items found therein were improperly admitted into evidence.

8. That your petitioner has previously filed a petition under Title 28, §2255 in the United States District Court for the District of Connecticut which dealt primarily with the petitioner receiving ineffective assistance of counsel,

(R-A)

and such petition was denied on February 9, 1972, solely on the ground that petitioner's claim of ineffective assistance of counsel was frivolous.

9. That the grounds enumerated above Paragraph 6, Section (a), was presented in the previous 2255 petition, but such grounds were not ruled upon in denying the previous petition.

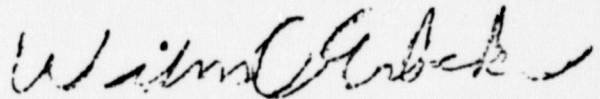
10. That your petitioner was represented by counsel at the arraignment and plea, at trial, at sentencing, and upon appeal, said counsel being one Mr. John Acampora, 109 Church Street, New Haven, Connecticut.

11. That your petitioner respectfully requests this Honorable Court to take note of elaboration of grounds on which he believes that his sentence is improper which are contained in petitioner's accompanying Memorandum in Support of this Petition.

12. That your petitioner, Tubbs, respectfully prays this Honorable Court to accept and incorporate all the grounds and reasons set forth and innumarated in his Affidavit of Bias and Prejudice and respectfully moves the Court to consider, accept and rule on the same as if they were set forth herein verbatim.

WHEREFORE, Petitioner, Frank Tubbs, respectfully prays this Honorable Court; (1) that the Court enter and hear this petition and permit the introduction and testimony thereon, and (2) that upon said hearing said petitioner be released forthwith, and for all further and complete relief in the premises.

Respectfully submitted,



WILLIAM C. ERBECKER
Attorney for Petitioner

WILLIAM C. ERBECKER
129 E. Market St. - #901
Indianapolis, Indiana
634-6236

MARK G. SKLARZ
200 Chapel Street
New Haven, Connecticut

MARK G. SKLARZ Co-Counsel
Attorney for Petitioner

(8-B)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FRANK TUBBS,

Petitioner,
vs

UNITED STATES OF AMERICA,

Respondent.

CAUSE NO. _____

Criminal No. 12,716

VERIFICATION

FRANK TUBBS

being duly sworn upon HIS

oath, deposes and says:

That the matters, facts and statements contained in the
attached ~~Complaint~~ (Petition) ~~(Motion)~~ are true to the best
of HIS knowledge, information and belief.

FURTHER AFFIANT SAYETH NOT.

STATE OF INDIANA]

COUNTY OF VIGO]

SS:

Frank Tubbs
(AFFIANT) FRANK TUBBS

Subscribed and sworn to before me, a Notary Public, this
21 day of July, 1972.

R.O. Hanel
Notary Public

My Commission Expires:

PAROLE OFFICER - AUTHORIZED
BY ACT OF JULY 7, 1955 TO
ADMINISTER OATHS (18 USC 400)

WILLIAM C. ERBECKER
129 E. Market St. - #901;
Indianapolis, Indiana 46204
634-6236

Attorney for Petitioner

(8-C)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FRANK TUBBS,

Movant
Petitioner,

vs-

CAUSE NO. 12,716

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT OF BIAS AND PREJUDICE
OF JUDGE BEFORE WHOM THIS MATTER
IS PENDING

FRANK TUBBS, first being duly sworn upon his oath,
deposes and says:

1. That he is the Movant in the above entitled cause in the United States District Court, District of Connecticut, in a cause entitled Frank Tubbs, Movant, versus United States of America, Respondent.
2. That he is represented in this cause by Attorney William C. Erbecker, a member of the Bar of Indiana, and also by an attorney who is a member of the bar of this Court, namely, Mark G. Sklarz.
3. That a Criminal Cause, entitled United States of America versus Frank Tubbs, has been heretofore tried in this Honorable Court wherein your Movant was convicted by a jury of Title 18 United States Code, Section 2113 (A), 2(a) and 2(b), alleging the taking by force and violence and intimidation from the person and presence of another, money belonging to and in the care, custody, control, management and possession of a bank insured by the Federal Deposit Insurance Corporation. Count Two charged violations of Title 18 United States Code, Section 2113 (d), 2(a) and 2(b) alleging that in the commission of acts alleged in count one, said aforesaid acts did put in jeopardy the lives of tellers and customers of said bank by use of dangerous weapon.
- Your Movant was sentenced to 19 years in prison. A Court of Appeals of the Second Circuit confirmed conviction of your petitioner.
4. That your petitioner, Tubbs, is now filing his Verified

(9)

Motion to Vacate and Set Aside Conviction and Judgment of the aforesaid sentence in a Section 2255 Petition, and he is alleging, and the record affirmatively shows that there is personal bias and prejudice on the part of the Honorable Robert C. Zampano, the Trial Judge, in said cause, all as hereinafter set out.

5. Under these circumstances this Affidavit of Bias and Prejudice of Judge Robert C. Zampano is timely filed, and no prejudice can or will result to the Government because of the filing of the same in this Section 2255 proceeding.

6. The affiant, Tubbs, states that the actions, demeanor, attitude, mannerisms, and the statements of Judge Zampano prior to, during, and immediately after the trial caused him to believe that the said Judge has a personal bias and prejudice against your Movant, Tubbs, and in favor of the Respondent Government. That the Honorable Judge Robert C. Zampano has already formed a firm opinion regarding the guilt of Tubbs and he therefore feels with all due respect to this Honorable Court, that he would be unable to receive a fair and impartial trial, and this Affidavit of Bias and Prejudice is made and filed before the setting for trial of the instant Motion to Vacate and Set Aside Sentence and Judgment of Conviction pursuant to Section 2255.

7. Your Affiant, Frank Tubbs, in good faith, states that Robert C. Zampano, Judge of the United States District Court, District of Connecticut, before whom this case will be assigned, has personal bias and prejudice against the Movant, Tubbs, and has personal bias and prejudice in favor of the respondent in this cause.

8. The Judge overruled and denied the first 2255 petition that was filed on March 9, 1972, pro se, without a hearing.

9. After the Counsel for the Government rested its case the Judge began to repeatedly and throughout the remaining defense for the defendant state: "the evidence is overwhelming against Mr. Tubbs in this matter" (with emphasis) . . . and even continued to keep saying it during sentencing proceedings.

10. On September 17, 1970, Tubbs was presented before Judge Zampano for sentencing, at which time his (Tubbs) motion for production and disclosure of the presentence investigation was denied by said Judge.

11. The actual sentence itself reflects the Judge's pre-

(O.A.)

Judice against Tubbs. Zampano is unjustly sentencing him to 20 years in prison, considering jail time, and suspended a five year sentence for the co-defendant Dare a/k/a/ Cushenberry a/k/a/ Apploberry and sentenced Avery to six years with possible parole within one year.

12. Motions for judgment of acquittal were made and filed by Tubbs at the close of the prosecutor's case and again at the end of all the evidence. They were denied each time by the Court (Judge Zampano). The Judge then charged the jury on the three counts of the indictment. The Jury retired for deliberations. The Judge retired to his chambers. In his chambers or sometimes during the juries' deliberations, Judge Zampano researched the 'Law' for the Government's Counsel, discovered an error in the Government's counsel's indictment against Tubbs, reconvened court, called the jury out of their deliberations, told the Government's Counsel that he had made a reversible error, the Judge and the Government's counsel got together and simply cut the third count of the indictment off of the certified original indictment, recharged the jury and sent them back to deliberate. Count three of the indictment was withdrawn from the jury based on the ruling in U.S. v. Roche, 321 Fed. 2d 1.

13. During the course of his (Tubbs) defense the court appointed counsel mis-led the court to believe that some of his (Tubbs) defense witnesses were last minute and attempted to come to his (Tubbs) aid. All of the witnesses on his (Tubbs) behalf had been listed and to the court appointed lawyer at least three to four months in advance. Tubbs raised his hand to clarify to the judge in an inane attempt that the witnesses were not last minute. Judge Zampano snapped, "will you take your hand down, and understand that (1) this Court frowns on last minute witnesses] (strong emphasis from the Judge). Then he added, "if you have anything to say to this court . . . say it through your court appointed counsel."

14. Also during the course of the defense, when Tubbs took the stand in an attempt to prove his innocence, the Judge assisted the Government's counsel (in the Government's counsel's favor) with his questioning and to his harm in the eyes of the jury and to Tubbs.

15. Also, after the Government's counsel rested his case, the Judge deliberately rushed the Court appointed attorney to present

(9-R)

his defense. He even asked a couple of times, how much longer is this going to take . . . and stated "this trial has gone on too long anyway . . ." and reflected to Tubbs his impatience as well as the jury.

16. Permission was requested by Tubbs to confront his accusers directly, through his lawyer, by questioning them himself, Judge Zampany also denied that motion.

17. The Court refused to furnish the jury with a map of the city, pointing out the various locations referred to during the trial, (the bank, the Orchard St. address and the motel and the Connecticut Mental Health Center) after the jury came out of deliberation to request it. That request was also denied in favor of the Government's counsel.

18. The Court erred and showed prejudice in denying Tubbs Motion To Produce, filed before the trial of this cause.

19. The Court erred and showed prejudice against the defendant Tubbs in permitting Counsel for the Government to ask leading questions of the witness Pamela Dare a/k/a Sarah Cushonberry a/k/a Pamela Appleberry and showed overwhelming prejudice in favor of the Counsel for the Government.

20. The Court erred and showed prejudice against Tubbs when the Judge permitted the Counsel for the Government to ask the bank employees leading questions in an attempt to identify Tubbs as a bank robber. the Judge permitted Counsel for the Government to have the employees of the bank point Tubbs out not as a bank robber but as a black man in accordance with the prosecutor's questions: "What race was the robbers?" They responded: "black," Then the Judge permitted them to point at Tubbs after the prosecutor would ask: "Is there anyone in this court room that looks like one of the robbers then . . ." Tubbs was the only black man in the court room during the whole line of questioning of all the bank employees. The spectator's doors were locked.

21. The Court showed prejudice and erred in permitting the Counsel for the Government to question Tubbs over objection concerning prior conviction and sentence of crime unrelated to the action being tried. In fact, the Judge pursued the line of questioning himself in favor of the prosecutor and to the harm of Tubbs.

(9-0)

15. Were you represented by an attorney or attorneys at any time during the course of the proceedings against

22. The Judge also erred and showed favoritism to the prosecution by not enforcing Tubbs' Motion for a Bill of Particulars. He permitted the prosecutor to hand the Court appointed counsel the statements of each Government's witness as they were called to the stand. This act by the Court permitted several prejudicial surprises to occurring against Tubbs during the course of the trial.

23. The Judge erred and showed prejudice against Tubbs by denying his Motion to Suppress all that "overwhelming evidence" the Judge kept referring to which was misleading, incriminating, illegally seized and lied about by the New Haven Police Department. This evidence was obtained without a search warzant or any arrest warrant from the motel that Tubbs lived in. Pamela Dare had had access to the premises with a key all that day, not to mention Johnson and Avery.

(1) The Court erred in permitting "lollie Pop" and Avery's roommate to testify concerning the defendants' previous and unrelated possession of an alleged pistol.

(2) The Judge erred and made manifest against Tubbs prejudice by permitting the jury to deliberate with the attache case involved in the jury room.

C O N C L U S I O N

Petitioner, Frank Tubbs, states that it is his belief and fear that the personal bias and prejudice of Judge Zampano against him will deprive him of a fair and constitutional hearing in an unbiased tribunal in the hearing of this petition.

This affidavit is made in support of a motion that Judge Zampano proceed no further and that this hearing and/or cause be assigned to another Judge for hearing, in accordance with the provisions of §144, Title 28, U.S.C.

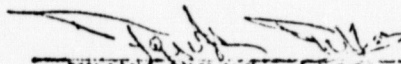
(9-D)

(6-A)

-6-

~~of State, Title 28, U.S.C.~~

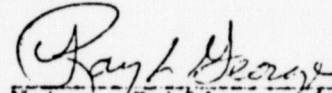
FURTHER AFFIANT SAYETH NOT.


FRANK TUBBS (Affiant)

STATE OF INDIANA]
COUNTY OF VIGO] SS:

Subscribed and sworn to before me, a Notary Public, and/or
an Institutional Officer authorized to subscribe and administer oaths,
this 2 day of 10, 1972.

My Commission Expires:


Notary Public and/or Officer
Authorized to Administer Oaths

5
4

CERTIFICATE OF GOOD FAITH

I, William C. Erbecker, attorney of record for the petitioner, Frank Tubbs, do hereby certify under the rules and provisions of Section 144, Title 28 U.S.C.A. that the attached Affidavit of Personal Bias and Prejudice made by the petitioner, Frank Tubbs, was made in good faith, and this certificate is made in good faith, and said documents are not frivolous or vexatious, and are not made for the purpose of hindrance or delay.

WILLIAM C. ERBECKER, Attorney
129 E. Market St. - #901
Indianapolis, Indiana 46204

STATE OF INDIANA]
COUNTY OF MARION] SS:

Subscribed and sworn to before me, a Notary Public, this
_____ day of _____, 1972.

My Commission Expires:

Notary Public

WILLIAM C. ERBECKER
129 E. Market St. - #901
Indianapolis, Indiana 46204
634-6236
Attorney for Movant

(9-E)

(6-B)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FRANK TUBBS,

Petitioner,

vs-

UNITED STATES OF AMERICA,

Respondent.

CRIMINAL NO. 12, 716

MOTION FOR CHANGE OF JUDGE PURSUANT TO
PROVISIONS OF TITLE 28 § 144

Frank Tubbs, by counsel, respectfully moves the Court for Change of Judge in this matter, and that the Honorable Robert C. Zampano, presiding judge at the trial of the original cause, proceed no further in this cause, and that this hearing and/or cause be reassigned to another Judge for hearing and/or trial, in accordance with the provisions of §144, Title 28, United States Code.

The Affidavit of Bias and Prejudice of Judge before whom this matter would normally be assigned (The Honorable Robert C. Zampano) is attached hereto and made a part hereof.

Respectfully submitted,

WILLIAM C. ENBECKER
Attorney for Movant-Petitioner
129 E. Market St. - #901
Indianapolis, Indiana 46204
634-6236

LEANDER C. GRAY

LEANDER C. GRAY Co-Counsel
Attorney for Movant-Petitioner

900 Chapel Street
New Haven, Connecticut
787-2294

(10.)

(6-C)

FILED

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

U.S. DISTRICT COURT
NEW HAVEN, CONN.

FRANK TUBBS :
v. : CRIMINAL NO. 12,716
UNITED STATES OF AMERICA :

MEMORANDUM OF DECISION

Petitioner, Frank Tubbs, currently serving a sentence of 19 years for bank robbery, has requested that this Court assign his second § 2255 motion to vacate his conviction to another judge, pursuant to the provisions of 28 U.S.C. § 144.

After Tubbs' jury trial and conviction in June, 1970, he was given leave to appeal in forma pauperis and the Court of Appeals for the Second Circuit affirmed this Court's judgment from the bench in April, 1971. The following August, petitioner filed his first § 2255 motion seeking a new trial on the ground that his attorney failed to represent him adequately at trial. The Court denied his motion without a hearing, stating inter alia:

The allegations in the petition are purely conclusory and frivolous. The evidence at trial was overwhelming. At all times the petitioner's attorney acted conscientiously and competently to protect his client's interests. The petitioner's contentions to the contrary are completely contradicted by the record.^{1/}

^{1/} Memorandum of Decision, Civil No. 14537, February 8, 1972.

(11.)

Petitioner's affidavit concerning his claims of prejudice, filed pursuant to the requirements of § 144, merely relates to adverse judicial rulings by this Court during the course of the trial, sentencing and post-conviction applications. These allegations do not constitute bias or prejudice on the part of the Court sufficient to cause recusal. See United States v. Beneke, 449 F.2d 1259 (8 Cir. 1971); United States v. Garrison, 340 F.Supp. 952 (E.D.La. 1972). Section 144 requires "a personal bias or prejudice either against him (the petitioner) or in favor of any adverse party." As was noted in Rea v. Ford Motor Company, 337 F.Supp. 950 (W.D.Pa. 1972), at 951:

Under the law, it is clear that the mere filing of such an affidavit does not disqualify a judge automatically. He must first determine if the affidavit is legally sufficient under the act, considering the facts (but not conclusions) alleged as true If this were not so, then every suitor disgruntled by judges' rulings could file an affidavit and force the judge to step aside and continue to do this until a judge satisfactory to him has been assigned.

See also Wolfson v. Palmieri, 396 F.2d 121, 124 (2 Cir. 1968).

The instant § 2255 motion is largely a rehash of Tubbs' first application coupled with claims raised on his appeal which were decided adversely to him. Thus the petition is without merit and must be dismissed. See Romano v. United States, 460 F.2d 1193, 1199 (2 Cir. 1972).

(7-A)

2

Accordingly, it is

ORDERED, that the motion of petitioner, Frank Tubbs, for the recusal of this Court be, and the same hereby is, denied; and it is further

ORDERED, that the motion to vacate and set aside conviction and sentence be, and the same hereby is, denied.

Dated at New Haven, Connecticut, this 2nd day of March, 1973.

Robert C. Zampano
United States District Judge

(11-B)

THE HONORABLE R.C. ZAPPALINO, ESQUIRE
UNITED STATES DISTRICT COURT JUDGE
FOR THE DISTRICT OF CONNECTICUT
NEW HAVEN, CONNECTICUT - 06505

RE: United States of America vs. Frank Tubbs - Case Number 12-716

Your Honor:

This letter is respectfully composed in response to this Court's order of November 5, 1973, - denying petitioner's motion to reduce sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure for the following reason, as set forth in the above said order:

"The Court being without jurisdiction to consider a Rule 35 motion not filed within 120 days of the date of sentencing."

It has come to the attention of the petitioner through reading the laws governing sentences that this Court is absolutely right in denying my motion for a sentence reduction which was not timely filed. It is also a great relief to petitioner that this Honorable Court has indicated the interest and consideration to respond after due consideration of this untimely motion with a prompt and understanding reply; and I thank you.

I do not wish to pretend adequate understanding of formal law and masquerade as an attorney (jail house lawyer), before your Honorable Court, and insult the integrity of the judicial system. I beseech this Court's patience and understanding in this endeavor to ask for a "legitimate" reconsideration within this Court's jurisdiction of this petitioner's "MOTION FOR A REDUCTION OF SENTENCE."

As the sentencing record in this instant cause will reflect to the Court's attention, petitioner was handed separately imposed sentences for violations of subsections (a) and (d), of 2113 Title 18, United States Code. The petitioner also believes that these sentences are illegally imposed, and are invalid for the following reasons:

1. The Supreme Court held that the 1937 Amendments to the Federal Bank Robbery Act created lesser offenses and that the aggravated offenses are merged into the aggravated offense to create only one crime. Since the intent of Congress is not to punish more severely than the language of its' laws, the penalties should not be pyramided.

2. However, subsections (a), (b), and (d), retain their own identities. They are separate and distinct offenses however closely related. Nonetheless, when a violation of subsection (d), is consummated and there are also convictions of subsections (a) and (b), then, for the purpose of sentencing the lesser offenses, (a) and (b) merge into the aggravated offense, subsection (d).

(12.)

See Prince vs. United States, 352 U.S. 322, 77 S. Ct. 403, 1-L. Ed. 2d 370 (1957)

The law appears to be clear that separate concurrent sentences must not be imposed for violations of subsections (a), (b), and (d), of Title 18, United States Code.

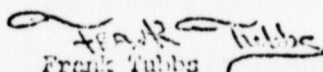
Also see: Heflin v. United States, 358 U.S. 415, 79 S. Ct. 451, 3 L. Ed. 2d 407 (1959); Hatlock v. United States, Civil No. 1930, F. Supp. 309, 398, (Feb. 24, 1970); United States v. Chester, 407 F. 2d 53 (3 Cir.), Cert. denied, 394 U.S. 1020, 89 S. Ct. 1642, 23 L. Ed. 2d 45 (1969); Green v. United States, 365 U.S. 301, 81 S. Ct. 653, 5 L. Ed. 2d 670 (1961); United States v. Welly, 287 F. Supp. 580 (E.D. Pa. 1968); Whalen v. United States, 367 F. 2d 468 (5 Cir. 1966); United States v. Gardner, 347 F. 2d 405 (7 Cir. 1965), Cert. denied 382 U.S. 1015, 86 S. Ct. 626, 15 L. Ed. 2d 529 (1966); United States v. Pointdexter, 293 F. 2d 329 (6 Cir. 1961), Cert. denied 368 U.S. 961, 82 S. Ct. 406, 7 L. Ed. 2d 392 (1962); Kitts v. United States, 243 F. 2d 883 (8 Cir. 1957); Miller v. United States, 147 F. 2d 372, 374 (2 Cir. 1945); United States v. Mayer, 235 U.S. 55, 67-69, 35 S. Ct. 16, 59 L. Ed. 129 (1914);

See also: 287 F. Supp. at 583-584; and: United States ex rel. Speaks v. Brierley, 417 F. 2d 597, 602 (3 Cir. 1969); United States v. Sacco, 367 F. 2d 368, 370 (2 Cir. 1966); North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 2656 (1969); United States v. Benz, 282 U.S. 304, 307-309 51 S. Ct. 113, 75 L. Ed. 354 (1931); See also note: 75 Yale L. J. 262, 313-17 (1965); United States v. Adams, 362 F. 2d 210 (6 Cir. 1966); Duggins v. United States, 240 F. 2d 479, 482 (6 Cir. 1957); Ekberg v. United States, 167 F. 2d 380, 388 (1 Cir. 1948); Mc Henry v. United States, 308 F. 2d 700, 704, 10 Cir. 1962); United States v. Bradford, 194 F. 2d 197 (C.A. 2d Cir.); United States v. Mc Gann, 245 F. 2d 670 (C.A. 2d Cir.); United States v. ex rel. Bogish v. Tees, 211 F. 2d 69, 71; Fooshoe v. United States, 203 F. 2d 247; Crow v. United States, 186 F. 2d 704; Ought v. United States, 215 F. 2d 578; Hoffman v. United States, 244 F. 2d 378; Miller v. United States, 256 F. 2d 501.

The law is now clear that separate concurrent sentences must not be imposed for violations of subsections (a), (b), (c) and (d) of 2113. United States v. Machibroda, 338 F. 2d 947 (C.A. 6, 1964). Section 2113 (a) (b) and (d) charges only one punishable offense. United States v. Wacinski, 268 F. 2d 862 (C.A. 7, 1957).

For the above stated reasons petitioner prays this Honorable Court to correct sentence re-U.S.C. Title 28, 2255 and upon said correction of sentence; petitioner prays this Honorable Court to reconsider petitioner's motion to reduce sentence and upon said reconsideration GRANT petitioner's motion for reduction of sentence, pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

Sincerely yours,


Frank Tubbs

(12-0)

Return Address: Frank Tubbs
Post Office Box # 33
Terre Haute, Indiana
47808

(12-B)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FILED
DEC 13 12 53 PM '73
U.S. DISTRICT COURT
NEW HAVEN, CONN.

UNITED STATES OF AMERICA :
v. : CRIMINAL NO. 12,716
FRANK TUBBS :

MEMORANDUM OF DECISION

Following the petitioner's conviction on two counts of bank robbery in violation of 18 U.S.C. §§ 2113(a) and 2113(d), this Court, on September 17, 1970, sentenced him to 19 years imprisonment on Count One and suspended the imposition of sentence on Count Two. The conviction was affirmed from the bench on appeal, without challenge to the sentencing, in April, 1971.

Relying on the principles established in Prince v. United States, 352 U.S. 322 (1957), the petitioner now moves to vacate his sentences and for a reduction of sentence, pursuant to Rule 35, F. R. Crim. P.

Under all the circumstances, it is hereby
ORDERED that the motion to vacate the sentence imposed on Count Two is granted, see Gorman v. United States, 456 F.2d 1258, 1260 (2 Cir. 1972); and it is further
ORDERED that the motion to vacate the sentence imposed on Count One is denied, see Gorman v. United States, supra; and it is further

ORDERED that the motion to reduce the sentence imposed on Count One is denied; and it is further

ORDERED that the petitioner's papers may be filed by the Clerk without payment of the statutory filing fee.

Dated at New Haven, Connecticut, this 13th day of December, 1973.

Robert C. Zemarno
United States District Judge

and disclosure of the presentence investigation was denied by said Judge.

11. The actual sentence itself reflects the Judge's pre-

(O.A.)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PETITION FOR A WRIT OF HABEAS CORPUS
(By a person in Federal custody)

FRANK TUBBS
Full name of Petitioner

vs

UNITED STATES OF AMERICA, ET AL
Name of Respondent

Civil No. N-74-88
To be
supplied by the
Clerk

1. Place of detention. UNITED STATES PENITENTIARY AT TERRE HAUTE, INDIANA
2. Name and location of the court which imposed sentence.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT AT NEW HAVEN, CONN.
3. Case number or numbers in court where sentenced.
CASE NUMBER: 12,716.
4. The offense or offenses for which sentence was imposed.
VIOLATION OF 18 U.S.C. 2113 (a) (d)
5. Date and terms of sentence or sentences.
SEPTEMBER 16th, 1970; SENTENCE IMPOSED: NINETEEN(19)YEAR REGULAR ADULT.
6. Was a finding of guilty made : (Check one)
(a) After a plea of guilty?
(b) After a plea of nolo contendere?
(c) After a trial by a judge?
☒ (d) After a trial by a judge and jury?
7. Did you appeal from the judgment of conviction or sentence imposed? YES If you answered yes, Then:
(a) To what court or courts did you appeal?
SECOND CIRCUIT COURT OF APPEALS; N.Y., N.Y.
(b) State the decisions of the court or courts to which you appealed. APPEAL DENIED
(c) If you know, give the date of each decision and a copy or citation of each. APRIL 4th, 1971.
8. If you did not appeal from your conviction and sentence or sentences why did you not do so?

D.C.:C-1-b

(14)

questioning and to his harm in the eyes of the jury and to Tubba.

15. Also, after the Government's counsel rested his case, the Judge deliberately rushed the Court appointed attorney to present

(9-B)

9. Now state simply and briefly why you believe that you are unlawfully in custody. Be sure and give all the facts which support your reasons. THE AMENDMENTS OF THE INDICENT WAS IMPROPER AND CONTRARY TO THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA. < See: 18 U.S.C.A. 2255 > (14-C)

10. Have you filed previous petitions for habeas corpus, motions under section 2255 of Title 28, United States Code, or any other applications, petitions or motions with respect to this conviction? YES.

11. If you answered yesto (10), list with respect to each petition, motion or application:

- (a) The specific nature thereof: 18-U.S.C.A. 2255 WHICH ALLEGED FIVE(5) GROUNDS. THE COURT CHOSE TO ACKNOWLEDGE ONLY ONE GROUND, IE. INEFFECTIVE ASSISTANCE OF COUNSEL.
- (b) The name and location of the court in which each was filed: UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT AT NEW HAVEN, CONNECTICUT.
- (c) The disposition thereof: PETITION WAS DENIED
- (d) The date of each such disposition: FEBRUARY 8th, 1972.
- (e) If known, citations of any written opinions or orders entered pursuant to each such disposition: 14587 AND 12,716... (COPIES ENCLOSED WITH PETITION)

12. If you did not file a motion under section 2255 of Title 28 United States Code, or if you filed such a motion and it was denied, state why your remedy by way of such motion is inadequate or ineffective to test the legality of your detention:

13. Has any ground set forth in (9) been previously presented to this court or any other federal court by way of petition for habeas corpus, motion under section 2255 of Title 28, United States Code, or any other petition, motion or application? YES.

14. If you answered yes to (13), identify: (A) THE BASIS OF THIS HABEAS CORPUS PETITION

- (a) Which grounds have been previously presented: (A)
- (b) The proceedings in which each ground was raised: (A)-THE GROUND(A) WAS RAISED IN THE 2ND 2255 PETITION. IT WAS BEYOND THE SCOPE AND DESIGN OF 2255 PETITIONS. IT IS UNDER THE AUTHORITY OF RELIEF UNDER HABEAS CORPUS(2241)(2243) AS IT IS ALLEGING A CONSTITUTIONAL VIOLATION OF PETITIONER'S RIGHTS AS GUARANTEED UNDER THE PROTECTION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

D.C.:C-1-b

(14-A)

concerning prior conviction and sentence of crime unrelated to the action being tried. In fact, the Judge pursued the line of questioning himself in favor of the prosecutor and to the harm of Tubbs. (9-0)

15. Were you represented by an attorney or attorneys at any time during the course of the proceedings against you? YES

(a) Name and give the address of such attorney or attorneys, if any, and state at what state of the proceedings he or they represented you. JOHN ACAMPORA, ESQ.- REPRESENTED PETITIONER AT TRIAL AND ON DIRECT APPEAL... ADDRESS: 109 CHURCH ST., NEW HAVEN, CONN... WILLIAM C. ERBECKER, ESQ.-REPRESENTED PETITIONER ON HIS SECOND 2255 PETITION...ADDRESS: INDIANAPOLIS, INDIANA 46201. AND LEAH GRAY, ESQ. -REPRESENTED PETITIONER ON HIS SECOND 2255 PETITION AS LOCAL COUNSELOR...ADDRESS: NEW HAVEN, CONNECTICUT.

16. Have you read the instructions furnished with this petition and checked all of the answers and statements made in this petition? YES

Frank Tubbs
Signature of Petitioner

State of ^{Indiana} ~~Connecticut~~) ss
County of Vigo)

Frank Tubbs, being first duly sworn,
Name of Petitioner
states that he has signed the foregoing petition and that the information therein is true and correct to the best of his knowledge and belief.

Frank Tubbs
Signature of Petitioner

Subscribed and sworn to before me this 13th day
of March, 1974.

Robert M. Tubbs
Notary Public

(Approved by the court February 1, 1965.)

D.C.:C-1-b

(14-B)

(9-D)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
NEW HAVEN, CONNECTICUT

FRANK TUBBS, PRO SE
PETITIONER

-VS-

UNITED STATES OF AMERICA, ET AL
RESPONDENT

Civil No.: N-74-88

CASE NUMBER: 12,716

MEMORANDUM IN SUPPORT OF PETITIONER'S PETITION
(FOR A WRIT OF HABEAS CORPUS)

(A) THE AMENDMENT OF THE INDICTMENT WAS IMPROPER AND CONTRARY TO THE FIFTH
AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.)

Now comes the Petitioner, Frank Tubbs, Pro Se, and respectfully represent to this Honorable Court the following:

Frank Tubbs, Petitioner, Pro Se, was charged by indictment in the United States District Court for the District of Connecticut by a Grand Jury in the following manner: Count One charged Petitioner with violation of Title 18 United States Code, Section 2113(a) and Title 18, United States Code, Section 2(a) and 2(b), alleging the taking by force and violence and intimidation from the person and presence of another, money belonging to and in the care, custody, control, management and possession of a bank insured by the Federal Deposit Corporation. Count Two charged violations of Title 18, United States Code, Section, 2113(d) and Title 18, United States Code, Section, 2(a) and 2(b), alleging that in the commission of the crime or acts alleged in Count One, said aforesaid acts did put in jeopardy the lives of tellers and customers of said bank by use of a dangerous weapon. Count Three charges violation of Title 18, United States Code, Section, 2113(c), alleging the possession of a sum in excess of \$100.00 which had been taken and carried away with intent to steal and purloin from a bank, the deposits of which were insured by the Federal Deposit Insurance Corporation.

Following the reading of the complete indictment, followed thereupon by a trial upon all Three Charges in which the prosecution was forced to introduce evidence in an attempt to prove all Three Charges, and in which it otherwise would not have produced in an attempt to disprove all Three Charges, and followed by a trial by jury in which the entire indictment was presented and considered, the indictment was thereupon amended by the Honorable R.C. Zappano, Trial Judge, who decided that Count Three of the indictment should be deleted from the indictment, and thereupon the Honorable R.C. Zappano, upon his own motion, recalled

(14-C)

WILLIAM C. KUNDECKER
129 E. Market St. - #901
Indianapolis, Indiana 46204
634-6236
Attorney for Movant

(9-E)

jury from their deliberations, recharged them informing them of the amendment, took the indictment-(12,716)- and a pair of scissors and physically removed Count Three from the indictment, returned the indictment to the jury and sent them back into deliberation.

The utter confusion which must have been a direct result of such an amendment can be noted by a reading of the fifty (54) four pages of the trial transcript (TR 844-898)- which were consumed by the charging and recharging (in accordance with erroneously amended indictment)- of the jury.

In federal prosecutions, it is generally held that the constitutional guaranty that no person shall be held to answer for a capital or infamous crime except upon a presentment of indictment by a grand jury requires adherence to the common law rule that the Court has no power to amend the body of an indictment. Russell -vs- United States, (1962) 369 U.S. 749, 82 S. Ct. 1038 8 Led 2d 240. It is recognized that this strick common law rule is apparently being relaxed in some respects, but it is noted that such relaxation involves only amendments which have to do with form, not of substance, and then only if not prejudicial to the defendant's substantive right. Johnson -vs- Florida (19), (CA5 Fla) 207 F 2d 314.

Clearly the action taken by Judge Zampano is not one which could be considered merely as form, but rather was one of substance, and affected greatly the presentation of evidence, and trial tactics of your Petitioner. Clearly such action by the Court violated the substantive right of the Petitioner as guaranteed by the Fifth Amendment of the Constitution of The United States.

To allow the prosecutor, or the Court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him. It is well settled that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form. Sitrone -vs- United States, (1960), 361 U.S. 212, 80 S. Ct. 270, 4 Led 2d 252.

"If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the consti-

(14-D)

(10.)

- 3 -

tution says 'no person shall be held to answer', may be frittered away until its value is almost destroyed...Any other doctrine would place the rights of the citizen, which were intended to be protected by the Constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it can be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon tomorrow to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisites of an indictment, in reality, no longer exist." Ex parte Bain, (1887), 121 U.S. 1, 7 S. Ct. 781, 30 Led 2d 849. (121 U.S. at 10, 13).

The federal courts have generally held or recognized that in federal prosecutions the Constitutional guaranty that no person shall be held to answer for a capital or infamous crime unless on presentment of indictment by a grand jury requires strict adherence to the common law rule that is beyond the power of the court to make or permit the amendment of an indictment. The rule that a federal court is without authority to make or permit an amendment of an indictment was followed or recognized in the following cases. Ex parte Bain, (1887), 121 U.S. 1, 30 led 849, 7 S. Ct. 781; United States -vs- Norris, (1920), 281 U.S. 619, 74 Led 1076, 50 S. Ct. 424; Stirone -vs- United States, (1960) 361 U.S. 212, 4 Led 2d 252, 80 S. Ct. 270; Russell -vs- United States, (1962) 369 U.S. 749, 8 L ed 2d 240, 82 S. Ct. 1038; Dodge -vs- United States, (1919), CA2 NY, 258 F 300, 7 ALR 1510, cert. den. 250 U.S. 660, 63 L ed 1194, 40 S. Ct. 10; United States -vs- Holtz, (1923), DC NY, 288 F 81, affd (CA 2d) F 1019.

In Dodge -vs- United States, (1919, CA2 NY) 258 F 300, 7 ALR 1510, cert, den, 250 U.S. 660, 63 L ed 1194, 40 S. Ct. 10, where, at the close of the case, government counsel moved to strike out as surplusage portions of the first and second counts of an indictment charging a violation of the Espionage Act, to which defendant's counsel said: "No objection", whereupon the motion was granted, and the jury convicted on the first and third counts, the court, affirming the conviction under the third count only, held that the amendments deprived the trial court of power to proceed upon the first two counts. The action was error of the most serious kind, said the court, the rule being that an indictment cannot be amended by the court and that an attempt to do so is fatal.

In Dowdy -vs- United States, (1931), CA4 NC, 46 F 2d 417, the court, reversing convictions of conspiracy to violate the prohibition law on other

(14-E)

grounds, overruled the contention that the refusal to strike out certain portions of the indictment was error, stating that a part of an indictment may be treated as surplusage and rejected, or it may be withdrawn from the consideration of the jury if not sustained by the evidence, but that it may not be stricken out. The rule that a portion of the charge not sustained by the evidence may be withdrawn from the consideration of the jury, but that a Court may not strike out part of an indictment was also recognized in Mellor -vs- United States, (1947, CAS NEB), 160 F 2d 757, cert den. 331 U.S. 848, 91 L ed 1858, 67 S. Ct. 1734 (affirming conviction of violating Mann Act).

In several cases in the federal courts, amendments with respect to a variety of happenings or circumstances have been denied under the application of the strict federal rule not allowing the amendment of indictments, other than with respect to matters of pure form, at least.

In Russell -vs- United States, (1962) 369 U.S. 749, 8 L ed 2d, 240, 82 S. Ct. 1038, wherein convictions for refusing to answer questions when summoned before a congressional committee were reversed on the ground that the indictments were defective in failing to identify the subject under inquiry, the court declared that allowing the prosecutor or the court to make a subsequent guess as to what was in the minds of the grand jury would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure, and that the underlaying principle was reflected by the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the charge is merely a matter of form.

Where a scheme to defraud by use of the mails was charged in the first Count of the indictment of incorporated by reference in 16 additional counts, and the trial court partially sustained and partially overruled defendant's demurrer, after which the clerk was directed to strike out portions of the first count relating to the formation and operation of the scheme, the court in Gandy -vs- United States, (1927, CA 5 Tex), 17 F 2d 479, reversing a conviction, said that a demurrer to a count should be either entirely sustained or overruled, and ruled that the action taken resulted in amending the indictment, something that could not have been done legally, and amounted to reversible error. But the court added that the charge in the indictment did not destroy it, the better rule being to consider the amendment void, and that a new trial might be had on the grand jury's original findings.

(11-A)

- 5 -

In Edgerton -vs- United States, (1944, CA 9 Cal), 143 F. 2d 697, convictions of using the mail to defraud were reversed, where the indictment averred that defendants represented that certain loans would be made only upon securities or property which had been approved as legal investments by certain state officials, and the trial judge instructed the jury that he struck out, and the jury should disregard, the portion relating to such approval, the court holding that the instruction worked as an amendment of the indictment which altered the nature of the alleged misrepresentation, with the result that defendants were tried on a charge different from that found by the grand jury, even though there was no physical striking of a portion of the indictment, and that the rule was applicable that federal courts are without power to alter or amend indictments.

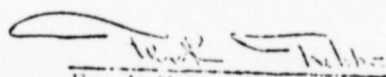
US - Jeffers -vs- United States, (CA 9 Ariz) 392 F 2d 749; Stewart -vs- United States, (CAS Iowa) 395 F 2d 484.

Indictment expired where it was amended in matter of substance other than by grand jury of sovereign who returned it. United States -vs- Williams, (CA3 NJ) 412 F 2d 625.

Charging part of indictment could not be changed by court to suit its notions of what it ought to have been or what grand jury would probable have made it if their attention had been called to suggestive changes. United States -vs- Florio, (DC NY) 315 F. Supp 795.

In those jurisdictions which adhere to the rule that the court has no power to authorize an amendment of an indictment, as is the case here, it is usually held that such unauthorized amendment of an indictment invalidates the indictment. (Ex parte Bain, Supra).

Respectfully Submitted,


Frank Tubbs
Affiant

DECLARED and SWORN to
before me this 1st day
of 11/11/78.

(14-G)

(11-B)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

APR 18 12 03 PM '74
U.S. DISTRICT COURT
NEW HAVEN, CONN.

FRANK TUBBS

v.

CIVIL NO. N-74-88

UNITED STATES OF AMERICA

JUDGMENT

This cause came on for consideration on a petition for a writ of habeas corpus, and the Court having entered its Ruling thereon under date of April 17, 1974, dismissing the said petition for lack of jurisdiction,

It is accordingly ORDERED, ADJUDGED AND DECREED that judgment be and is hereby entered, dismissing the petition for writ of habeas corpus for lack of jurisdiction.

Dated at New Haven, Connecticut, this 18th day of April, 1974.

Clerk, United States District Court

By James J. Long
Deputy-in-Charge

Delivered
4/22/74
4:15 PM
HRC.

(15.)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

U.S. DISTRICT COURT
NEW HAVEN, CONN.

FRANK TUBBS

v.

UNITED STATES OF AMERICA

CIVIL NO.

N-74-88

RULING ON APPLICATION FOR A WRIT
OF HABEAS CORPUS

The petitioner's application for habeas relief merely seeks to relitigate issues previously raised and rejected at trial, on appeal, and in two § 2255 motions. In any event, since petitioner is presently incarcerated in the United States Penitentiary at Terre Haute, Indiana, this Court lacks jurisdiction to grant him the post-conviction relief he seeks. 28 U.S.C. § 2241(a); Schlenger v. Seamans, 401 U.S. 487 (1971).

Accordingly, the papers may be filed without fee; the petition is dismissed.

Dated at New Haven, Connecticut, this 17th day of April, 1974.

Robert C. Zappano
United States District Judge

Relieved
4/22/74
4:25 PM
NPC.

(15-A)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
NEW-HAVEN, CONNECTICUT

FRANK TIBBS, Pro se
Appellant

-vs-

UNITED STATES OF AMERICA,
Appellee

Civil No. H-74-33

ORDER TO: OFFICIAL COURT REPORTER

FORUM TO:

TITLE 28 U.S.C.A., FEDERAL RULES OF
CRIMINAL PROCEDURE, RULE 10 (b)

Comes now Frank Tibbs, Petitioner, Pro se, pursuant to Title 28
U.S.C.A., Federal Rules of Appellate Procedure, Rule 10 (b), and re-
spectfully request the following:

(1) Transcribe and/or copy from the official records in the cause
entitled: United States of America v. Frank Tibbs, Cause No. 12,726,
page numbers 844 through 893 of the official trial transcript in said
said cause no. (12,726), and


(2) Forward said said transcribed and/or copied fifty-four (54)
pages of trial transcript to: The United States Court of Appeals for
The Second Circuit, United States Courthouse, Foley Square, New York,
N.Y. 10007.

ONLY COPY AVAILABLE

(16.)

Further, Frank Rubin, Petitioner pro se, states that:

(3) I am prepared to pay the cost for the transcribing and/or copying of the respectfully requested records in above paragraph numbered (2), as soon as I am contacted by your office to so do. I can be contacted at the below undersigned address.


Frank Rubin, Applicant
Reg. No. 37001-103-S
P. O. Box 33
Troy, Maine, Indiana 47060

(16-A)

NOTICE TO APPELLEE OF PARTIAL

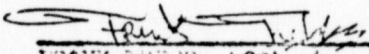
TRANSCRIPT ORDERED

Pursuant to Title 28 U.S.C.A. Federal Rules of Appellate Procedure, Rule 10 (b), Petitioner, Frank Tubbs, Pro se, is hereby notifying:

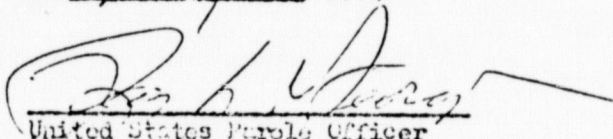
Office of United States Attorney
Mr. Stewart H. Jones, Esq.
Federal Bldg. - Dist. of Connecticut
New Haven, Connecticut 06505

VIA: United States Postage, Registered, Air-Mail, Special Delivery in
the prescribed time in the attached copy of:

ORDER TO: Official Court Reporter
Pursuant to:
Title 28 U.S.C.A. Federal Rules of
Appellate Procedure, Rule 10 (b).


FRANK TUBBS, Applicant
Reg. No. 37081-133-G
P. O. Box 33
Terre Haute, Indiana 47308

SUBSCRIBED and SWORN to
before me this 1 day
of May, 1974.


United States Parole Officer

(16-B)

THE COURT: Ladies and gentlemen, you have heard the evidence presented in this case. You have heard the summations of the government attorney and the lawyer for the defense. And now, in the orderly course of the trial, we come to what is known as the charge: that is, the instructions of law which it is my duty to give you.

It is exclusively the function of the Court to set forth the rules of law which govern the case, with instructions as to their application. On these legal matters you must take the law as I give it to you; you are not at liberty to do otherwise.

On the other hand, you members of the jury are the sole and exclusive judges of the facts.

Therefore, you are to apply the law, which the Court gives to you, to the facts as you find them, and in this way, you will render your ultimate verdict.

✓ As you know, the defendant, Frank Tubbs, has been charged in a three count indictment with three separate violations of the federal bank robbery statute. Before taking up with you in detail the separate crimes charged and instructing you, as to each, the specific statutory provision involved, the specific violation charged in

the indictment and the essential elements of each crime charged, I should like briefly to summarize the three crimes charged and their relationship to each other. This will enable you at the outset to grasp the overall accusation and thus better understand the details of each alleged crime as I take up each with you separately.

The defendant is accused, in one count, of robbing a bank of a sum in excess of \$100. That's one count. In another count, he is charged with robbing the bank of a sum of money by means of force and violence or intimidation. That's two counts. And in the third count: of assaulting a bank teller and putting his life or her life in jeopardy by use of a dangerous weapon, and in this case, a revolver, while robbing the bank of a sum of money. Now, those are the three counts and their interrelationship.

Since each count of the indictment charges the defendant with a separate crime, you must consider the essential elements of each count separately and return a verdict on each count of either not guilty or guilty, so that your verdicts will be three in number, and on each count your foreman will announce: not guilty or guilty, and he will do this orally. Your verdict on one count, of

course, should not influence your verdict on any other count.

Federal law prohibits the taking, by force and violence or by intimidation, from the person or presence of another, money belonging to or in the custody of a bank which is insured by the Federal Deposit Insurance Corporation. This federal statute is known as Title 18, United States Code, Section 2113(a) and reads, in pertinent part, as follows:

"Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or anything of value belonging to, or in the care, custody, control, management, or possession of, any bank . . . (shall be punished)."

The defendant is charged with a violation of this federal statute or law.

Federal law also prohibits the taking away, with intent to steal, money exceeding \$100 belonging to, or in the custody of a bank which is insured by the Federal Deposit Insurance Corporation. This federal statute is known as Title 18, United States

Code, Section 2113(b) and reads, in pertinent part, as follows:

"Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceed \$100 belonging to, or in the care, custody, control, management, or possession of any bank, . . . (shall be punished)."

The defendant is also charged with a violation of this federal statute or law.

Lastly, federal law also makes it a separate crime for anyone who commits the offense charged in count one, to assault any person or to jeopardize the life of any person by the use of a dangerous weapon.

Specifically, the statute the defendant is charged in count two with having violated, reads as follows:

(Whoever, in committing . . . any offense defined in subsection[s] (a) . . . of this section, assaults any person, or puts in jeopardy the life of any person by the use of a danger weapon . . ." (shall be guilty of a crime).

The defendant is also charged with a violation of

this federal statute or law.

Before I read the indictment to you, I should like to point out the function of an indictment.

An indictment by a grand jury is the formal method of accusing this defendant of a certain crime. It merely defines the crime charged and the manner of its alleged accomplishment. The indictment is without bearing or significance in your consideration of this case and is to be accorded no weight by you in determining the guilt or innocence of this defendant. By his plea of not guilty, the defendant has denied each and every allegation set forth in the indictment.

The indictment reads as follows:

The grand jury charges in count one that on or about February 3rd, 1970, at New Haven in the District of Connecticut, Frank Tubbs, the defendant, did by force and violence and intimidation take from the person and presence of another money belonging to and in the care, custody and control and possession of the New Haven Savings Bank, Fairhaven office, in New Haven, Connecticut, the deposits of which were then insured by the Federal Deposit Insurance

"If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggest changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the consti-

(14-D)

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Corporation in violation of federal law.

Count two: That on or about February 3rd, 1970, at New Haven in the District of Connecticut, Frank Tubbs, the defendant, did by force and violence and by intimidation, take from the person and presence of another, money belonging to and in the care, custody and control, possession and management of the New Haven Savings Bank, Fairhaven office, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and in committing the aforesaid acts, did put in jeopardy the lives of tellers and customers then in the aforesaid bank, including, but not limited to, Lorraine Cassella, John R. McGuire, Mr., Adeline Rush, and Carol Carrano, by use of a dangerous weapon, that is, a gun in violation of federal law.

✓ I should mention at this time that I inadvertently said to you a moment ago that that was count three. It is count two. So, in other words, count one is the taking by force and violence the money belonging to the federal bank; count two is taking that money and -- by force and violence and while doing so putting in jeopardy

an indictment cannot be amended by the court and that an attempt to do so is fatal.

In Dowdy -vs- United States, (1931), 214 NC, 46 F 2d 417, the court, reversing convictions of conspiracy to violate the prohibition law on other

(14-E)

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the life of any person in the bank by use of a dangerous weapon, so when I said count three I should have said count two.

And finally, now, Count three reads as follows:

On or about February 3rd, 1970, at New Haven, in the District of Connecticut, Frank Tubbs, the defendant, willfully and unlawfully did possess a sum in excess of \$100 which had been taken and carried away with intent to steal from the New Haven Savings Bank, Fairhaven branch, the deposits of which were insured by the Federal Insurance Corporation, all in violation of federal law.

Now, there are two general types of evidence from which you may properly find the facts in a criminal case. One is direct evidence, such as the testimony of an eyewitness. The other is circumstantial evidence, the proof of a chain of circumstances pointing to the commission of the offense.

Circumstantial evidence may be received and is entitled to such consideration as you may find it deserves depending upon the inferences you think it necessary and reasonable to draw from such evidence. No greater degree

could not have been done legally, and amounted to reversible error. But the court added that the charge in the indictment did not destroy it, the better rule being to consider the amendment void, and that a new trial might be had on the ground of jury's original findings.

(14-F)

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of certainty is required when the evidence is circumstantial than when it is direct, for in either case the jury must be convinced beyond a reasonable doubt of the guilt of the defendant. Circumstantial evidence consists of facts proved from which the jury may infer by a process of reasoning other facts sought to be proved.

Now, difference inferences, of course, may be drawn from the facts and circumstances in the case, whether proved by direct or circumstantial evidence. The prosecution asks you to draw one set of inferences while the defendant asks you to draw another. It is for you to decide, and for you alone, which inferences you will draw. If all the circumstances taken together are consistent with any reasonable hypothesis, which includes the innocence of a defendant, the government has not proved his guilt beyond a reasonable doubt, and you must acquit him. On the other hand, if you find that all of the circumstances established by the evidence in this case, taken together, satisfy you beyond a reasonable doubt of the guilt of the defendant, in accordance with these instructions, it is your duty to find him guilty.

In this case, ladies and gentlemen, as in all

DECLARED and SWORN to
before me this 1st day
of 1978.

(14-G)

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criminal prosecutions, the defendant is presumed to be innocent until proven guilty beyond a reasonable doubt. This presumption of innocence was with this defendant when he was first presented for trial in this case. It continues with him throughout this trial. As far as you are concerned, he is innocent, and he continues innocent unless and until such time as all the evidence and the matters produced here in the orderly conduct of the case, considered in the light of these instructions of law, and deliberated upon by you in the juryroom, satisfy you beyond a reasonable doubt that he is guilty.

The burden of proof to prove the defendant guilty of the crimes with which he is charged is upon the government. The defendant does not have to prove his innocence. This means that the government must prove beyond a reasonable doubt each and every element necessary to constitute the crimes charged. Whether the burden of proof resting upon the government is sustained, depends not on the number of witnesses, nor on the quantity of the testimony, but on the nature and quality of the testimony.

Now, a reasonable doubt means a doubt founded upon reason. As the words imply, it is a doubt as will be

entertained by a reasonable man after all the evidence in the case is carefully analyzed, compared and weighed by you. A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the government to prove a defendant guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon a failure of the prosecution to establish such proof. However, absolute or mathematical certainty is not required, but there must be such certainty as satisfies your reason and judgment, and such that you feel conscientiously bound to act upon it. It is not a fanciful doubt, or a whimsical or capricious doubt, for anything relating to human affairs and depending upon human testimony is open to some possible or imaginary doubt. Reasonable doubt is the kind of a doubt upon which reasonable men or women like yourselves, in the more serious and important affairs in their own lives, would hesitate to act. On the other hand, if all the evidence has been impartially and thoroughly reviewed by you and if it produces in your minds a settled and abiding conviction as you would be willing to act upon

in matters of the highest importance relating to your own affairs, then, and in that event, you would be free from a reasonable doubt. If the evidence warrants in your judgment the conclusion that the defendant is guilty so as to exclude every other reasonable conclusion, you should declare him to be guilty; but, in on all the evidence, you have a reasonable doubt as to the guilt of the defendant, you must find him not guilty.

Now, in the course of the summations in this case some attention was drawn to a witness who was not called to testify. It was inferred that had he been called as a witness, he might by his testimony have thrown light on the situation before you. It is true that where a party fails to call to the stand a witness who, if so called, could testify as to any material fact, and where it is within the sole or peculiar power of that party to call him, you are entitled to infer that had he testified, that testimony would be unfavorable to the party failing to call him, and to consider that fact in arriving at your verdicts. You must, however, first reasonably conclude that the person not called could give material testimony and that it was within

the sole or peculiar power of the party failing to call him to put him upon the witness stand. If it is equally within the power of either party to call him, and neither does, then there is no basis for inference that his testimony, if given, would be unfavorable to either party.

Now, each of the separate offenses charged in this case has certain essential elements which I am about to describe to you. The government has, as I have indicated, the burden to prove every element necessary to constitute each of the crimes charged. You should consider each count of this indictment separately and determine whether the government has met its burden of proof on each of the essential elements of that count. The fact that you may find the defendant guilty or not guilty of one of the offenses charged should not control your verdict with respect to the other offenses charged.

Under count one of the indictment, the defendant is charged with a violation of Title 18, United States Code, Section 2113(a), which I read to you a few moments ago.

There are four essential elements of this offense which the government has the burden of proving beyond a

reasonable doubt as to the defendant. They are:

- 1) That this defendant took money which belonged to or was in the custody, control, management or possession of a bank;
- 2) That the deposits of the bank were insured by the Federal Deposit Insurance Corporation;
- 3) That the taking of the money was by force and violence or by intimidation; and
- 4) That the money taken was from the person or in the presence of another person in the bank.

In determining whether these four essential elements have been proven beyond a reasonable doubt by the government, you may, if you wish, ask yourselves four basic questions with respect to the defendant regarding count one of the indictment:

First: Did the defendant take money which belonged to or was in the custody, control, management or possession of a bank?

The word "defendant", as you know, refers to Mr. Tubbs. At the very outset of your deliberations, therefore, you must decide whether the government proved beyond a reasonable doubt Mr. Tubbs was actually

present in the New Haven Savings Bank on February 3, 1970. If the government failed to sustain its burden of proof beyond a reasonable doubt that Mr. Tubbs was in the bank on that date, then the case is over. You should, therefore, return a verdict of not guilty. I am not going to dwell on the evidence on this point. I am sure the government's claims and the defendant's claims on the issues of identification and implication are still fresh in your mind.

If you find beyond a reasonable doubt that the defendant was present in the New Haven Savings Bank at the time and date alleged, then you must deliberate further on the remaining part of the first question or issue and that is: did the government prove beyond a reasonable doubt that the defendant took money which belonged to or was in the custody, control, management or possession of a bank?

As used here, the word "take" has its ordinary meaning, that is, to seize, remove or carry away. The words "belonged to," "custody," "control," "management," and "possession," also have their ordinary meaning. If you find that the defendant did take money from the New Haven

Savings Bank on February 3, 1970, and that money was in the bank's custody or possession, or money on deposit or used in its ordinary business transactions, that would be sufficient to satisfy the requirements of this first element of the offense. If you answer this first question in the negative, then you should deliberate no further and return a verdict of not guilty. If you answer this first question in the affirmative, then you should consider this second question:

Second: Was the bank from which the money was taken insured by the Federal Deposit Insurance Corporation?

And on this question you may, if you wish, consider the testimony of the bank employee who testified and also Exhibit 1, which I believe is a photocopy of a certificate of insurance issued by the Federal Deposit Insurance Corporation insuring the deposits of the New Haven Savings Bank.

If you find that the government has proven this second element of the offense beyond a reasonable doubt, then you must go on to consider this third question:

Third: Was the taking of the money from the bank

done by force and violence or by intimidation?

By the term "force and violence" is meant the use of actual physical pressure or constraint. It means such display of physical prowess as is calculated to inspire fear of physical harm to those opposing the will of the person exerting the force. But force and violence does not necessarily include actual physical contact, although it may. Any conduct which would result in bodily fear or terror is sufficient to constitute force and violence as used in this statute.

"Intimidation" has a somewhat, although not altogether, different meaning. Intimidation is sometimes referred to as "constructive force." In general it means to put in fear or to inspire with fear. This fear or terror may be inspired without physical violence or even spoken threats; it may be accomplished merely by a menacing attitude and a display of force. Threats by word or by gesture may constitute intimidation, if the effect of such words or gestures is to put in fear of physical harm the person towards whom they are directed.

This putting in fear must arise from the conduct of the defendant. On the other hand, this fear need not

be so great as to result in great terror, panic or hysteria.

There has been evidence introduced by the government in this case designed to prove the taking of the money in this case was done by use of a dangerous weapon. It is reasonable to infer that confrontation by a dangerous weapon, such as a revolver, will place the person so confronted in fear sufficient to constitute intimidation as used in the statute. So where intimidation is relied upon, it must be established by proof of conduct, words or circumstances reasonably calculated to produce fear. But it is not necessary that there be proof of actual fear, as fear may be inferred where there is just cause.

I further instruct you that it is not necessary to find that the taking was accomplished by means of both force and intimidation. Taking the money by means of either force or intimidation is sufficient to comply with the requirements of the statute.

Now, if you find that the government failed to prove beyond a reasonable doubt that the taking of the money was done by force and violence or done by intimidation, then you should answer this third question

in the negative and bring in a verdict of not guilty on count one. On the other hand, if you find that the government has sustained its burden on this third element of the offense, as I have defined it to you, then you go on to consider the fourth element of the offense, which I will put to you in the form of the following question:

Fourth: Was the taking of the money from the person or in the presence of another?

This fourth element of the offense requires that the taking of the money must be from the person or in the presence of another. In this regard, you may consider the testimony of the bank employees who testified concerning the time of the robbery and their actual presence throughout the events which they have described.

If you find that any one of these four essential elements of the crime charged in count one, as I have stated to you, has not been proven beyond a reasonable doubt, the defendant must be acquitted on count one. If, however, you are convinced beyond a reasonable doubt that the government has sustained its burden of proof as to each element, then you are to return a verdict of guilty on count one against the defendant.

There are two essential elements of the crime charged in count two of the indictment, each of which the government has the burden of proving beyond a reasonable doubt before there can be a conviction of the defendant on this count:

1) That the defendant did commit the offense charged in count one of the indictment and that you have found him guilty on that count;

2) That in committing the offense charged in count one, the defendant either (a) assaulted a person or (b) jeopardized the life of a person by use of a dangerous weapon.

The two essential elements of the crime charged in count two of the indictment are reflected in two basic questions, your answers to which will determine your verdict on this count:

First: Did the defendant commit the offense charged in count one of the indictment and have you found the defendant guilty as charged therein?

Obviously, before you may find the defendant guilty on count two, you must first have found him guilty on count one of having taken, by force and

violence or by intimidation, from the person or presence of another, money belonging to a bank, the deposits of which are insured by the Federal Deposit Insurance Corporation.

If you have found the defendant not guilty on count one, you must return a verdict of not guilty on count two.

The mere fact that I am charging you on count two is not intended as any indication whatsoever of how the Court anticipates you will find on count one. But if you have found the defendant guilty on count one, then you should proceed to consider the second essential element of the crime charged in count two, reflected in this question:

Second: Did the defendant, in committing the crime charged in count one, either: (a) assault a person, or (b) put in jeopardy the life of any person by use of a dangerous weapon?

An "assault" consists of any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability to do so and an intentional display of force such as would give the victim reason to expect immediate bodily harm. An assault may be

committed without actually touching, or striking, or inflicting bodily harm upon the person of another. Thus, a person who has the apparent present ability to inflict bodily harm or injury upon another person and who willfully attempts or even threatens to inflict such bodily harm, as by intentionally flourishing or pointing a pistol at another person, may be found to have assaulted such person.

A "dangerous weapon" includes anything capable of being readily operated, manipulated, wielded, or otherwise used by one or more persons to inflict severe bodily harm or injury upon another person. Thus, an operable firearm or a loaded firearm, such as a pistol, revolver, or other type gun, capable of firing a bullet or other ammunition, may be found to be a dangerous weapon.

To "put in jeopardy the life" of a person "by the use of a dangerous weapon" means to expose such person to risk of death, by the use of such dangerous weapon. Fear of death alone is not enough; there must be proof that lives were objectively in danger. And on this issue you may consider, if you wish, whether or not the gun was loaded.

If the government has failed to sustain its burden

of proof on this issue, you should return a verdict of not guilty on count two.

On the other hand, if you find that the government has sustained its burden of proving that the defendant committed the crime charged in count one, and either assaulted a person or put in jeopardy the life of any person by the use of a dangerous weapon, then you should find the defendant guilty as charged in count two.

I have now explained to you the essential elements of counts one and two. Now I am going to discuss with you the essential elements of count three of this same indictment. Under count three of the indictment the defendant is charged with taking and carrying away, with the intent to steal, money in excess of \$100.00 from a bank, the deposits of which are insured by the Federal Deposit Insurance Corporation. I shall now instruct you on the elements of this offense which the government must prove beyond a reasonable doubt in order to sustain a conviction under count three.

First: That the defendant was actually present in the New Haven Savings Bank on February 3, 1970;

Second: That the defendant took and carried away

money in excess of \$100.000, with the intent to steal it;

Third: That the money so carried away was taken from a bankinsured by the Federal Deposit Insurance Corporation.

At the very outset, again, you must deliberate on the first element of the offense, that is, you must decide whether the government proved beyond a reasonable doubt Mr. Tubbs was actually present in the New Haven Savings Bank on February 3, 1970. If the government failed to sustain its burden of proof that Mr. Tubbs was in the bank on that date, then the case is over with respect to all counts and you should return a verdict of not guilty. On the other hand, if you find beyond a reasonable doubt that Mr. Tubbs was present in the bank at the time and date alleged, then you must deliberate further on the next essential element of the offense charged in count three of the indictment.

The next element is that the defendant took and carried away money in excess of \$100.00.

If the government proved that beyond a reasonable doubt, then you should go on to consider the last essential

element of the crime charged in that count, and that element is that the money was taken from a bank insured by the Federal Deposit Insurance Corporation.

Now, I have previously instructed you on that essential element with respect to the other counts and will not repeat those instructions here.

By way of summary, then, under count three of the indictment there must be proof beyond a reasonable doubt that there was a taking and carrying away of money in excess of \$100.00 from the bank with an intent to steal it; and if the government failed to sustain its burden of proof with respect to any of the essential elements of that count, as I have charged you, then you must return a verdict of not guilty. If, however, you are convinced beyond a reasonable doubt that the government has sustained its burden of proof as to each element, then you are to return a verdict of guilty on this count against the defendant.

Now, in performing your function, one of the most important things you have to do is pass upon this matter of credibility, that is, the "believability," of the various witnesses who have appeared before you. In

passing on the credibility of each of the witnesses, there are certain considerations you may well have in mind. One of these is the appearance which the witness made when he was on the stand; you should try to "size him up." Did he appear to be telling the truth? Did he appear to be honest? Did he appear to be intelligent? That is, did he appear to be a person who could have observed accurately what he is telling you about; who would be likely to have remembered it accurately, and who was capable of reporting it to you accurately?

Another question for you to have in mind regarding each witness is the question as to whether the story he has told you is plausible. Does it ring true, or are there inconsistencies in it? How does it fit in with other evidence in the case which you do believe and other facts you find to have existed? Does it jibe with that evidence and those facts? In short, does the testimony which was given by the particular witness whose credibility you are considering seem to you to be plausible? In this connection, you may also bear in mind that if you should find that any witness has been deliberately falsifying on any one material point

in his testimony, you are privileged to take that fact into consideration in determining whether he has falsified on other points. Simply because you find that a witness has not repeated one fact to you accurately, it does not necessarily follow that he is wrong on every other point. A witness may be honestly mistaken on one element of his testimony and be entirely accurate and correct on all other points. But if you find that a witness has deliberately lied on one material subject, it is only natural that you should be suspicious of his testimony on all subjects, and under those circumstances, you are entitled to disbelieve his whole testimony. Whether you do disbelieve it or not, however, lies in your own sound judgment. You have the right to reject testimony even though it is uncontradicted if you feel you have a justifiable reason for doing so.

Another question you may well ask yourself in passing on the credibility of any witness is as to whether that witness has any bias or interest in the outcome of the case, and if so, whether he has permitted that bias or interest to color his testimony. It, of course, does not follow simply from the fact that a

witness does have a bias or does have an interest in the outcome of the case his testimony is to be disbelieved. There are many people who, no matter what their interest in the outcome of the case may be, would not testify falsely. On the other hand, a jury should always bear in mind that if a witness has a decided bias or has an interest in the outcome of the case, that bias or interest offers something of a temptation to shade his own testimony in accordance with his bias or sway him to advance his own interest, whether that be to gain some advantage for himself or to do damage to another.

In short, you are to bring to bear the same considerations and use the same sound judgment you apply to questions of truth and veracity which are daily presenting themselves for your decision in the ordinary affairs of life.

Testimony given by a government law enforcement agency agent or state law enforcement agent is entitled to no special or exclusive sanctity merely because it comes from a police officer. The testimony of such an agent who takes the witness stand is subject to the same examination and same tests as the testimony of every other

witness.

I should also like to charge you at this time that a previous statement given by a witness which is inconsistent with testimony given by him at the instant trial, may be taken as substantive evidence of the truth of the assertions contained in such previous contradictory statement, if you find such previous testimony credible. On the other hand, you need not do so. It is the exclusive province of the jury to give such testimony such credibility as you may think it deserves.

The testimony of a witness may be discredited or impeached by showing that he had been convicted of a felony. Prior conviction, however, does not render a witness incompetent to testify, it merely reflects on his credibility. It is the province of the jury to determine what weight, if any, should be given to such prior conviction as impeachment.

Now, there has been comment concerning the testimony of the witnesses Cushenberry and Avery who were accomplices in the alleged crimes. An accomplice is one who voluntarily participated in

the commission of a crime. If the jury believes that any witness directly participated as an accomplice in the commission of the offenses charged, that person's testimony should be closely examined and weighed with great care and caution. On the other hand, the mere fact that a witness may be an accomplice does not mean that it is impossible for him to tell the truth. It only means that you are to examine his testimony with care and caution and, if, having done so, you believe it is the truth beyond a reasonable doubt, then you may give it the same credence as the testimony of other witnesses whom you believe beyond a reasonable doubt.

With respect to the defendant Tubbs, you should test his credibility under the same principles you apply to the other witnesses. An accused person is not obliged to take the stand in his own behalf. On the other hand, he has a perfect right to do so, as this defendant has done. An accused person, having taken the witness stand, is before you just as any other witness. Therefore, his testimony should be measured in the same way as any other witness.

It is appropriate for me at this time to

comment on one aspect of defendant Tubbs' testimony and defense. You will recall that on the date of the robbery, Tubbs denied being at the bank or participating in its robbery and called certain witnesses to corroborate his testimony. These defenses are known in law as "alibis." An alibi is a legal and proper defense; and if after weighing the evidence the jury has a reasonable doubt that the prosecution has proved the defendant Tubbs was present at the time and place the robbery was committed, then he must be acquitted of the charged.

Now, in conclusion, ladies and gentlemen, I impress upon you that you are duty-bound as jurors to apply the law as you have been advised by the Court to the facts of this case as you find them.

After lunch, you will return to the juryroom. Please do not discuss this case at all among yourselves at lunch or when you get back to the juryroom. When you get back to the juryroom, I will ask you to come back into the courtroom, this is after lunch, at which time I will excuse the two alternates and give you another minute or so of instructions concerning the form of verdict and the election of a foreman or forelady.

What we are going to do right now is recess for lunch. When you come back you are going into the juryroom. During all this time, because the marshals will be with you and the two alternates, there will be no mention whatsoever of this case. When you come back to the juryroom I will bring you out into the courtroom again, give you another minute of instructions, excuse the two alternates, and at that time you can start your deliberations after the exhibits are brought in.

I will stay on the bench for 1 minute.

You should consider yourselves, incidentally, as still being in the course of the charge, so that would prohibit you from talking to anyone other than passing the time of day among yourselves, making any phone calls or anything of the sort, you are in the custody of the marshal and Mr. Prete and if you want to -- if you want a message to go out to someone at home, give the message to Mr. Prete or the marshal and they will make all calls for you.

So have a good lunch. I hesitate to say I will see you back at quarter to 2:00 or 2 o'clock, but I will get word when you are back in the juryroom and I will bring

you back out.

Have a good lunch.

(Jury excused at 12:25 p.m.)

THE COURT: Gentlemen, although technically the charge has not been completed for all intents and purposes, all I am going to tell the jury when they come back to the courtroom after lunch is that they should go in the jury-room, elect a foreman and decide this case on the basis of the facts as they find them and apply those facts to the law as I have presented it to the jury.

We can utilize this time for exceptions to the charge in the event I slipped up somewhere. I still have an opportunity to charge them when they come back, and also I would like to take this time to have counsel carefully with the clerk go through each and every exhibit that is going into the juryroom so that there will be three sets of eyes examining what is going into the juryroom to prevent an exhibit marked for identification or some other exhibit inadvertently getting in the pile. So I will impress upon counsel for the government, counsel for the defendant and the clerk the duty to get the proper exhibits ready so that this afternoon, when the jury comes in to

deliberate, we can send in the proper exhibits.

We will take exceptions to the charge.

The government first.

✓ MR. CRANE: Yes, your Honor. I have several. First, count two the government did not charge assault, and count three of the indictment -- this is 2113(c) -- and it is merely possession of money taken from the bank and in your charge --

✓ THE COURT: I wish you had interrupted me, Mr. Crane. You know, I charge 100 times bank robbery cases, and that this government always charges attacking and carrying away a sum of money in excess of \$100. I suppose I should have realized when I read it, but I thought this was a straight-down-the-line case, and I really think the government should have pointed that out to me, that this was a twist in the usual bank robbery case. I mean, to take an exception, of course, is ridiculous, there is nothing to take an exception about. I made a mistake. This should have been pointed out to me immediately by the government.

MR. CRANE: In the middle of your charge?

THE COURT: In the middle of the charge, or before the charge. This is the first case I have not asked the

government to present the essential elements of each count, and it is a case that the government should have, without being instructed to, alerted me to the fact that there was a twist in the counts. Of course, I have to recharge the jury, there is no question about it; and in the meantime, by 1:15, the government will submit formal charges and requests on count three with the essential elements.

What else, Mr. Crane?

MR. CRANE: Nothing else.

THE COURT: The defendant, do you have anything to alert me to?

MR. ACAMPORA: No, your Honor.

THE COURT: No exceptions to the charge?

MR. ACAMPORA: No.

THE COURT: I will have to bring the jury back in and recharge them on count three and count two.

(Recess for lunch.)

AFTERNOON SESSION

THE COURT: The Court will go over its situation with respect to its charge and, of course, at the conclusion of its own views will entertain any comments from counsel as to their thoughts on how we can this charge in shape so that the jury fully and correctly understands what their duties are and what the principles are that are to be applied.

First, it is important to review the situation. The Court correctly read the three charges in the indictment to the jury. However, with respect to count three it inadvertently set forth the essential elements of another statute. Count three charges a violation of 2113(c) and the Court inadvertently gave the jury the principles to be applied under Section 2113(b).

The ultimate responsibility, of course, for the error is on the Court, and I believe I can correct that easily and succinctly by calling the jury back in, which was as we left it with respect to count three.

The second aspect of the charge is that the Court charged the jury on assault, and the government is not claiming that the defendant assaulted anyone, it is just

claiming that he jeopardized the lives or life of a person in the bank. That easily is corrected.

The Court finds there is no prejudice at all, because in effect I am taking aspects of the charge away from the jury, I am not adding anything to the charge. However, when the Court, while the jury was out to lunch, started to analyze the indictment, and perhaps it was one of those subconscious things that affect the Court when it prepared its charge, it realized that based on prior experience that Section (c) is never charged in an indictment with respect to a man who goes into the bank, that is, if the government claims a man goes into a bank and robs the bank, Subsection (c) is never charged.

The Court's own experience is that Subsection (c) was used when a third party accepts the proceeds from a bank robbery but that party himself does not enter the bank, so the Court started to do some research and found a case which it considers on all fours, that Subsection (c) is inconsistent with Subsections (a) and (d), so I had full intentions of coming out on the bench and charging the jury very carefully on the principles to be applied with respect to the Court's inadvertent reference to certain

essential elements under count three by taking count three away from the jury, which again would benefit the defendant. I had intended fully to explain to the jury what occurred in the charge, that they should wipe clean from their mind and take count three away from the jury and just charge again on counts one and two, so in effect the defendant is not charged with three counts, but only two.

Much to my surprise, the government submitted some requests to charge and cited the very case that I had found during the lunch hour, which completely supports, in my opinion, my view that Subsection (c) should not be charged in this case, and I fail to understand how the government can cite a case to the Court which is in direct -- which is a direct holding to the contrary.

Now, I don't mean to unduly score the government, but we had enough problems here, and the case the government cited to me is the very case that I found, United States versus Roche, 321 Fed. 2nd at 1, and at Page 6 the Court after reversing -- because the lower court charged as count three Subsections (c) in addition to (a) and (d) -- it went on to state: "It seems clear that Subsection (c) was not designed to increase the punishment

for him who robs a bank, but only to provide punishment for those who receive the loot from the robber," and it goes on in that vein and it goes on further, "The charge of the trial judge that the jury could find the appellant guilty on all four counts erroneously permitted a finding of guilt on count three, which would indeed be inconsistent with such a finding on counts one, two and four."

And lastly, of course, as the Court views the government's evidence, there is no claim in this case that Mr. Tubbs is charged with the crime of possessing or receiving money that he knew was stolen in this bank robbery by somebody else, clearly the issues were framed during the trial and in summation that he was in the bank.

If the jury finds that he was not in the bank, he should be acquitted, there is no claim, at least as I heard the evidence, that there was a third party in the bank and that Mr. Tubbs just received stolen money.

✓ So here is what I am going to do, and here is where I in advance will tell counsel what I intend to tell the jury, so listen to me carefully and I will accept any suggestions:

. "While you were out to lunch, it came to my attention

that I went astray in my charge, and I will now seek to correct some of the instructions I gave you. I urge you to bear with me. In a nutshell, I charged you on count three of the indictment and I now instruct you to wipe clean from your minds each and every statement I made with respect to count three. The charge that I read to you from the indictment entitled Count Three is not a matter for the jury. You have no concern with it and it should not enter your discussions while you deliberate on counts one and two.

"The second item which I wish to call to your attention is that under count two I referred to the two essential elements which the government must prove beyond a reasonable doubt: one was that the government must prove that the defendant committed the offense charged in count one, the second essential element was that the defendant in committing the offense charged in count one either assaulted a person or jeopardized a life of a person by use of a dangerous weapon.

"I wish to correct the latter aspect of that instruction by telling you that the government does not contend the defendant assaulted any person in the bank.

It claims only that the life of a person was jeopardized by use of a dangerous weapon, therefore, wipe clean from your minds everything that the Court stated with respect to an assault under count two.

In an excess of caution, I am going to review my entire charge with you, highlighting those instructions which should be retained and applied by you in your deliberations and pinpointing exactly those areas of the charge which are not applicable to the charges in this case."

And then I will ask them to bear with me again, and I intend to go through the entire charge, such things as right from the start, telling them at the very outset I instruct them as to their functions and mine, they should retain everything I said. I will reread the indictment to them. I will reread the essential elements under counts one and two, of course, leaving out the assault under count two and again telling them here and there that count three is not in the case.

Now, that's the general areas I will cover when I bring the jury back in.

Mr. Acampora, do you have anything to say? Would

you like to confer with the defendant first?

MR. ACAMPORA: Yes, your Honor, for a brief moment.

THE COURT: Have you conferred with the defendant?

MR. ACAMPORA: Yes, your Honor. In reference to count three, will this indictment be presented to the jury in their deliberations?

✓ THE COURT: There are two ways we can handle it. One: not send them the indictment at all, and if we do cut off count three, which, as I look down, can easily be done because it's right at the bottom of the page, and we can cut off count three or block it out, but as far as I am concerned, do you prefer I not send it in at all, is that --

Attorney for Defendant

MR. ACAMPORA: Well, the thinking in my mind is: if he is -- if the jury is presented with the indictment on three counts and we have only instructed them on two counts, perhaps this would create confusion.

✓ THE COURT: I agree. That's why I said we will not give them the indictment, and if they should ask for it, as you are looking at your indictment right now, you can see where we can cut it off where it says: Count Three, and there will be just two counts.

MR. ACAMPORA: My other question would run to the propriety of dropping the third count after going to trial on three counts under the indictment and its effects as to propriety of the entire trial at this time based on the three count indictment, it now going to the jury on two counts.

THE COURT: Well, I really don't see any prejudice there because it is not uncommon, first of all, at the end of a case for a Court to strike certain counts from an indictment because of failure of proof or to dismiss counts or for the government to withdraw counts, and it is recognized that the jury certainly can understand the Court's instruction and follow it that certain counts are no longer their concern.

Actually, it would, at least in my opinion, if any inference at all is to be drawn, inure to the detriment of the government when the jury hears that the Court has taken away a charge from its consideration. Now, if we were adding something that the government brought to my attention, I could see hwere highlighting it at this point would have the jury going back or starting its deliberations with highlighting something that may be

prejudicial to the defendant, but here the highlighting is something very advantageous to the defendant. A charge is being withdrawn on Court order.

Moreover, I find no proof in the case that the charges under Subsection (c) were proved and I don't even think Subsection (c) was mentioned by counsel in summations by either side, so I don't think there is prejudice. I think on its face it is helpful to the defendant, and in any event, if there should be any possibility of prejudice, I am going to charge the jury very carefully, as you heard.

Is there something you would like me to stress a little more than I have? Is there some other wording that you prefer?

MR. ACAMPORA: No, your Honor, not in your charge. I find no difficulty in saying that your charge was in accordance with my thinking. The only question which seems to arise in my mind at this point: perhaps some confusion in the minds of the jury as to why the third count was removed and would it be prejudicial at this time to perhaps give them a word as to why it was removed?

THE COURT: What would you like me to say?

MR. ACAMPORA: Perhaps the small explanation -- part of the explanation which was given to counsel at this time, being that the counts are inconsistent with one another in the extent that the government has not proven a case of possession or has not gone forward on the possession of the money, but on Mr. Tubbs being present in the bank at that time and that possession of the money in this case doesn't have any bearing as to count three.

THE COURT: I don't know if I have your exact wording, but I will have something along those lines.

Anything else?

MR. ACAMPORA: No.

THE COURT: Mr. Crane?

MR. CRANE: No, the government has nothing.

THE COURT: Bring in the jury.

(Jury brought in.)

THE COURT: Ladies and gentlemen, just prior to the luncheon recess and during the charge, which had not been completed, several matters have come to the Court's attention, which will result in my finishing the charge this afternoon, and it being of greater length and I had intended. I hope you will bear with me and I am sure we will straighten it all out.

While you were out to lunch it came to my attention that I went astray in my charge, and I will now seek to correct some of the instructions I gave you, and I wish you would listen very carefully to what I have to say.

In a nutshell, the Court has found that count three has not been proven by the government as a matter of law and withdraws that count from your consideration.

In other words, in a nutshell, the jury is only to be concerned with counts one and two.

✓ I charge you that with respect to count three of the indictment, to wipe clean from your minds each and every statement I made with respect to count three. The charge that I read to you from the indictment entitled count three is now not a matter for the jury. You will have no concern with it and it should not enter your discussions

while you deliberate on counts one and two.

The second item which I wish to call to your attention, is that under count two I refer to the two essential elements which the government must prove beyond a reasonable doubt.

One was that the government must prove that the defendant committed the offense charged in count one.

The second essential element was that the defendant in committing the offense charged in count one, either assaulted a person or jeopardized the life of a person by use of a dangerous weapon.

I wish to correct the latter aspect of that instruction by telling you that the government does not contend the defendant assaulted any person in the bank.

It claims only that the life of a person was jeopardized by use of a dangerous weapon, therefore, wipe clean from your minds everything the Court stated with respect to an assault under count two.

Now, in an excess of caution I am going to review my entire charge with you, highlighting those instructions which should be retained and applied by you in your deliberations and pinpointing exactly those areas of

the charge which are not applicable to the charges in this case.

Again I ask you to bear with me. The matter is really not complex or complicated at all but I just want to make sure that the jury fully and completely understands the principles of law it will apply in its deliberations.

Now, at the very outset of the charge I explained to you the function of the Court and jury. You are to retain what I said in that instruction.

Then I explained to you what the charges were and I told you that you had to consider each of the charges separately and come out with separate verdicts.

I told you there were three counts. Now I am telling you there are only two, and the two counts are, in a nutshell, that, one, the defendant was accused of robbing the bank of a sum of money by means of force and violence or intimidation; and in the second count, of putting the life of a person in jeopardy by use of a dangerous weapon, a revolver, while robbing the bank of a sum of money. Those are the two counts. Of course, on each of those counts you return a verdict of not guilty or guilty.

Then I read you the statute involved. The first statute is 2113(a), and that is count one:

"Whoever by force and violence or by intimidation takes or attempts to take from the person and presence of another any property or money or anything of value belonging to or in the care, custody, control, management or possession of any bank, shall be punished." That is count one.

Count two: Whoever in committing any offense, defined in such Section (a) which I just read to you, of this section, puts in jeopardy the life of any person by the use of a dangerous weapon, shall be guilty of a crime. So that is your count two, the jeopardy count.

Then you may recall I talked to you about the function of an indictment, which is really a moving paper that deserves no weight. You will recall everything I said on the function of an indictment, and then I read to you the three counts in the indictment, and you now know that count three is out, and I will read to you the two counts that are relevant:

"On or about February 3, 1970, at New Haven in the District of Connecticut, Frank Tubbs, the defendant

herein, did by force and violence and intimidation take from the person and presence of another money belonging to and in the care, custody, control, management and possession of the New Haven Savings Bank, Fairhaven office, New Haven, Connecticut, the deposits of which were then insured by the Federal Deposit Insurance Corporation, in violation of Federal law.

"Count two: On or about February 3, 1970, at New Haven in the District of Connecticut, Frank Tubbs, the defendant herein, did by force and violence and by intimidation take from the person and presence of another, money belonging to and in the care, custody, control, management and possession of the New Haven Savings Bank, Fairhaven office, New Haven, Connecticut, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and in committing the aforesaid acts, did put in jeopardy the lives of tellers and customers then in the aforesaid bank, including but not limited to Lorraine Cassella, John R. McGuire, Jr., Adelaine Rush and Carol Carrano, by the use of a dangerous weapon, that is, a gun, in violation of federal law.

Those are the two counts, and the only counts with

which you are concerned.

Then you may recall I talked to you about direct and circumstantial evidence. You retain everything I said on that subject. Then you may recall I talked to you about the presumption of innocence. You will retain everything I mentioned on that subject.

You will recall I discussed with you the burden of proof and you will apply those instructions to this case.

Reasonable doubt was then discussed and you will apply each and every statement I made with respect to that subject to this case.

Then I mentioned the failure to call a witness, and you will retain what I said with respect to that subject.

Then I discussed with you the essential elements of the crime charged, and I told you that each of the separate offenses in this case, certain essential elements, and I told you that you must consider each count separately, and now I am going to just briefly go over, to refresh your recollection, the essential elements of the two counts that you will be concerned with.

The government has to prove each and every essential

element beyond a reasonable doubt, and they are with respect to count one:

That this defendant took money which belonged to or was in the custody, control, management or possession of a bank; two, that the deposits of the bank were insured by the Federal Deposit Insurance Corporation; three, that the taking of the money was by force and violence or by intimidation; and four, that the money taken was from the person or in the presence of another person in the bank.

Then I repeated the same four essential elements by putting them in the form of questions for you, and you will retain everything I said under Count one.

Then you will recall I discussed count two with you, and I told you that there were two essential elements to count two, and I said first, that if the defendant did commit the offense charged in count one of the indictment, and that you have found him guilty on that count, that is, that you only get to count two if you have found the defendant guilty on count one, and, of course, the government has the burden of proof on each of the essential elements of these crimes.

Then I said, of course, if you found the defendant

not guilty on count one, he has to be acquitted on count two. If you find him guilty under count one, then you should consider whether he is also guilty under count two.

So if you find that he did not commit the crime charged in count one, he is acquitted on count two. But if you find he did commit the crime charged in count one, then you are to consider this next essential element:

That in committing the offense charged in count one, the defendant jeopardized the life of a person by use of a dangerous weapon. That is what you are to consider under these new instructions. Forget everything I said about assault; just jeopardy.

I will repeat the jeopardy for you. To put in jeopardy the life of a person by use of a dangerous weapon means to expose such person to risk of death by use of such dangerous weapon. Fear of death alone is not enough. There must be proof that lives were objectively in danger.

In other words, jeopardy means actual jeopardy and not merely that the person thought he was in danger. On this issue you may consider whether or not the gun was loaded.

Then I went on to tell you, if the government has failed to sustain its burden of proof on this issue, you should return a verdict of not guilty on count two.

On the other hand, if you find that the government has sustained its burden of proving that the defendant committed the crime charged in count one and put in jeopardy the life of any person by the use of a dangerous weapon, then you should find the defendant guilty as charged in count two.

That takes us right up to where I started talking about count three, and we are going to eliminate that completely from the charge and from your minds.

Then right after that I talked to you about the credibility of witnesses, and I went through the various considerations, and you will retain each and every statement I made on credibility of witnesses.

At that point we recess for lunch and here we are.

So in conclusion, ladies and gentlemen, I impress upon you that you are duty-bound to apply the law as I have now given it to you, as you have been advised by the Court, particularly since you returned from lunch, but, of course, the relevant parts prior to lunch, which I

went over with you, to the facts of this case as you find them.

Take this case with you to the juryroom, determine the facts on the basis of the evidence as it has been presented to you, apply the law as I have outlined it to you, then render a verdict fairly, uprightly and without a scintilla of prejudice.

When you have reached your verdicts, they must be unanimous. It is the duty of each juror to discuss and consider the opinions of the other jurors, but despite that in the final analysis it is your individual duty to make up your own minds and to decide this case upon the basis of your own individual judgment and conscious.

With that, the jury may now retired to the juryroom, elect a foreman or forelady, and proceed to your deliberations of the case after the exhibits have been brought into you by the marshal or by Mr. Prete.

You must render a separate verdict as to each of the two counts of the indictment and it will be oral.

The clerk will say in effect, "How do you find on one count," and your foreman will say, "We find guilty,"

or, "We find not guilty."

"How do you find on count two?"

"We find guilty," or, "We find not guilty."

That, of course, depends on your findings. When you have reached your verdict, inform the clerk through the bailiff, then return to the courtroom and announce your verdicts.

At this time I will excuse the two alternates. I thank them very much for serving in this case. I know it is a bit of a disappointment not to confer with your colleagues after hearing the case, but you have performed a valuable function in that if any one of the regular jurors became ill or was unable to attend, you would have prevented a mistrial. So the two alterantes are excused.

I will ask the jury now to go into the juryroom, but do not start your deliberations until the exhibits reach you and the two alternates have left, which will be a moment or two.

The jury is now excused.

(Jury excused at 2:43 p.m.)

THE COURT: Have counsel had an opportunity to

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRANK TUBBS, PRO SE
APPELLANT
V.
UNITED STATES OF AMERICA
APPELLEE


DOCKET NO: 74-1671

V E R I F I C A T I O N

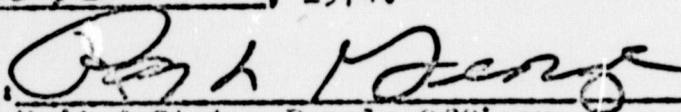
Frank Tubbs, Appellant, Pro Se, being duly sworn upon his oath, deposes and says:

That the matters, facts and statements contained in the attached legal document/(s) is/(are) true to the best of his knowledge, information and belief.

FURTHER AFFIANT SAYETH NOT.


Frank Tubbs, Affiant

Subscribed and Sworn to and before me this 14 day of June, 1974.

SS. 
United States Parole Officer

Frank Tubbs
37031-133-G
P. O. Box # 33
Torre Haute, Indiana
47808

Appellant Pro Se

